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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

In re William F. Dart Trust

On Petition For A Writ of Certiorari
To The Supreme Court Of
The State Of Michigan

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Statement of Questions Presented for Review

Petitioners in this case initiated a proceeding in 1992 in the Probate Court of Ingham County, Michigan, raising certain state law claims relating to the administration of the trust of W.F. Dart, the grandfather of petitioner Thomas J. Dart and the founder of the Dart Container Company. In 1993, petitioners filed a state court action in Florida asserting only Florida state law claims. The Michigan Probate Court enjoined prosecution of all but one of these state law claims. Finally, in 1994, petitioners filed an action in the United States District Court for the Middle District of Florida, stating only federal law claims against certain of the parties to the Probate Court proceeding as well as certain other parties. This action sought only money damages.

The Probate Court held petitioners in contempt of the prior injunction for filing this federal action. The questions presented are:

1. Whether the Michigan Probate court violated the Supremacy Clause of the United States Constitution and this Court's prior rulings in *Donovan v. City of Dallas,* 377 U.S. 408 (1964), and *General Atomic Co. v. Felter,* 434 U.S. 12, 18-19 (1977), when it (a) enjoined Petitioners from exercising their right to prosecute federal-law claims for money damages in federal court, and (b) compelled Petitioners, by use of contempt proceedings and under threat of imprisonment, to dismiss their federal court action?

2. Whether the Michigan Probate court erred in attempting to determine whether Petitioners' federal district court RICO action was an action *in personam, in rem,* or *quasi in rem* rather than leaving that determination to the federal district court?

3. Whether the Michigan Probate court erred in concluding that Petitioners' federal district court RICO claim was an action *in rem* or *quasi in rem* even though the only relief sought was money damages?

List of All Parties to the Proceeding in the Court Whose Judgment is Sought to be Reviewed

NAME	AGE	RELATIONSHIP	ADDRESS
William A. Dart	Adult	Son of William F. Dart and father of Thomas J., Robert C., and Kenneth B. Dart, and Trustee (or former Trustee)	Represented by: BARRIS, SOTT, DENN & DRIKER Eugene Driker, Stephen E. Glazek, and Morley Witus 211 West Fort Street - 15th Floor Detroit, MI 48226-3281
Claire T. Dart	Adult	Wife of William A. Dart and mother of Thomas J., Robert C., and Kenneth B. Dart, and Trustee (or former Trustee)	Represented by: BARRIS, SOTT, DENN & DRIKER

NAME	AGE	RELATIONSHIP	ADDRESS
Thomas J. Dart	Adult	Grandson of William F. Dart, son of William A. and Claire T. Dart, and a beneficiary of the Thomas J. Dart Residual Trust (T-1)	Represented by: FRASER TREBILCOCK DAVIS & FOSTER, P.C. Everett R. Zack and Michael E. Cavanaugh 1000 Michigan National Tower Lansing, MI 48933 CRAVATH, SWAINE & MOORE David Boies and Thomas E. Dewey Worldwide Plaza 825 Eighth Avenue New York, NY 10019 BERGER & MONTAGUE, P.C. Merrill G. Davidoff, Jerome M. Marcus and John R. Taylor 1622 Locust Street Philadelphia, PA 19103 (NOTE: Berger & Montague's *pro hac vice* admission was revoked by Order dated August 19, 1994. See Note 2 in the main text.) OF COUNSEL: Theodore Souris (P20803) Charles N. Raimi (P29746) BODMAN, LONGLEY & DAHLING 100 Renaissance Center 34th Floor Detroit, Michigan 48243

NAME	AGE	RELATIONSHIP	ADDRESS
Judith C. Dart	Adult	Wife of Petitioner Thomas J. Dart and beneficiary of T-1	Represented by: FRASER TREBILCOCK DAVIS & FOSTER, P.C. CRAVATH, SWAINE & MOORE BERGER & MONTAGUE, P.C. (NOTE: Berger & Montague's *pro hac vice* admission was revoked by Order dated August 19, 1994. See Note 2 in the main text.) OF COUNSEL: BODMAN, LONGLEY & DAHLING
Thomas J. Dart, Jr., Justin M. Dart and Alexis A. Dart	Minors	Great grandchildren of William F. Dart, grandchildren of William A. and Claire T. Dart, children of Thomas J. Dart and Michelle Reynolds, and beneficiaries of the Thomas J. Dart Residual Trust (T-1)	c/o Y. Gladys Barsamiam *Guardian ad Litem* Represented by: BEIER HOWLETT James L. Howlett 200 East Long Lake Road Bloomfield Hills, MI 48304
Kenneth B. Dart	Adult	Grandson of William F. Dart, son of William A. and Claire T. Dart, and a beneficiary of the Kenneth B. Dart Residual Trust (T-2) and the Kenneth B. Dart Residual Subtrust	Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C. Webb A. Smith, Lawrence B. Lindemer, and Alan J. Claypool 313 South Washington Square Lansing, MI 48933-2193

NAME	AGE	RELATIONSHIP	ADDRESS
Janice M. Dart	Adult	Wife of Kenneth B. Dart, and a beneficiary of the Kenneth B. Dart Residual Subtrust	Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C.
Kelly M. Dart, Corina L. Dart, and Kristin J. Dart	Minors	Great grandchildren of William F. Dart, grandchildren of William A. and Claire T. Dart, children of Kenneth B. and Janice M. Dart, and beneficiaries of the Kenneth B. Dart Residual Subtrust	c/o Kenneth B. Dart *Guardian ad Litem* Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C.
Robert C. Dart	Adult	Grandson of William F. Dart, son of William A. and Claire T. Dart, and a beneficiary of the Robert C. Dart Residual Trust (T-3) and the Robert C. Dart Residual Subtrust	Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C.
Katina E. Dart	Adult	Wife of Robert C. Dart, and a beneficiary of the Robert C. Dart Residual Subtrust	Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C.

NAME	AGE	RELATIONSHIP	ADDRESS
William R. Dart and Arianna C. Dart	Minors	Great grandchildren of William F. Dart, grandchildren of William A. and Claire T. Dart, children of Robert C. and Katina E. Dart, and beneficiaries of the Robert C. Dart Residual Subtrust	c/o Robert C. Dart *Guardian ad Litem* Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C.
Dart Financial Corporation, a Nevada corporation	N/A	Designated as the Trustee of all of the trusts	c/o William A. Dart, President and Treasurer Represented by: BARRIS, SOTT, DENN & DRIKER

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Reference to the Official and Unofficial Reports of Opinions Delivered in the Case

The decision of the Michigan Probate Court, holding petitioners in contempt for filing a federal claim in federal court, is reproduced at Pet. App. 52a. That court's decision refusing to find the contempt purged by the deletion of certain parties as defendants, and on sentencing, is reproduced at Pet. App. 76a.

The Michigan Circuit Court's decision affirming the Probate Court is reproduced at Pet. App. 62a. The Order of the Michigan Court of Appeals, denying review, is reproduced at Pet. App. 63a.

The Michigan Supreme Court's decision denying review is reproduced at Pet. App. 64a, 65a.

None of these decisions or orders is published.

Jurisdictional Statement

The order sought to be reviewed was entered by the Supreme Court of the State of Michigan on November 29, 1995. This Court's jurisdiction derives from 28 U.S.C. §1257.

Text of Constitutional Provisions and Statutes

The Supremacy Clause of the United States Constitution, U.S. Const. at VI cl.2, provides that "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

STATEMENT OF THE CASE.

W.F. Dart died on March 31, 1976, survived by his wife, Ruth R. Dart, his only son, W.A. Dart, and three grandsons: Petitioner Thomas J. Dart, Kenneth B. Dart and Robert C. Dart. Prior to his death, W.F. Dart established a Trust Agreement that was substantially restated by an Amendment dated March 23, 1976. The Third Amendment called for the division of the trust property into two funds, denominated as Fund A and Fund B. Fund A was a trust for the benefit of W.F. Dart's wife, Ruth, who has since died and whose trust is no longer in existence. Fund B was to be divided into three equal trusts, referred to as T-1, T-2 and T-3, for W.F. Dart's grandchildren. T-1 was established for the benefit of Petitioner Thomas Dart and his spouse and children. T-2 was to benefit Kenneth B. Dart and his spouse and children, and T-3 was to benefit Rob-

ert C. Dart and his spouse and children. The nominal trustee for T-1, T-2 and T-3 is Dart Financial Corporation, which is controlled by W.A. Dart and Claire Dart, the father and mother of Thomas, Kenneth and Robert. Until December 1986, the assets of the three trusts continued to be equal, consisting primarily of the stock of Dart Management Corporation, the parent holding company of a plastics business (Dart Container Corporation and its subsidiaries and affiliates) and an oil and gas business (the Thomas J. Dart Corp., Dart Energy Corp., and Emerald Oil Division of Dart Management Corp.). In 1986, the assets of the three trusts were worth between seven hundred million and one billion dollars.

The genesis of the underlying litigation was a December 1986 reorganization of the Dart family companies and the trust assets which left T-1 holding substantially fewer assets than either T-2 or T-3. On February 21, 1992, Petitioner Thomas J. Dart commenced an action in the Probate Court for Ingham County, Michigan (the Michigan Action). Thomas Dart filed a First Amended Petition in the Michigan Action on or about October 2, 1992, and his wife, Judith Dart, joined the action by filing a petition on or about June 17, 1993. The petitions allege, *inter alia,* that W.A. Dart committed multiple breaches of his fiduciary duty to the beneficiaries of T-1, and had systematically favored the interests of T-2 and T-3 beneficiaries over the interest of the T-1 beneficiaries. The petitions request several forms of relief, including, among other things, replacement of the trustee; supervision of the administration of the trusts and the maintenance of the *status quo* pending the outcome of the litigation; invalidation of the 1986 reorganization; a determination that the purported valuation of assets pursuant to the 1986 reorganization was improper; and a re-valuation of those assets.

On July 16, 1993, Petitioners brought an action in the Circuit Court of the Twelfth Judicial Circuit of the State of Florida, Sarasota County, Case No. 93-3804 CA-01 (the Florida State Court Suit), against respondents and several additional parties, asserting claims for fraud, undue influence, negligent misrepresentation, breach of contract, tortious interference with contract, breach of fiduciary duty, conversion,

conspiracy, professional malpractice, intentional infliction of emotional distress and violation of Florida Statute §772-103 ("Civil Remedies for Criminal Theft") Practices, incorporating by reference Chapter 812 of the Florida Statutes, dealing with "Theft, Robbery, and Related Crimes." The relief sought in the Florida State Court Suit includes a determination that the 1986 reorganization is void, as well as money damages.[1]

In response to the commencement of the Florida State Court Suit, respondents sought and obtained from the Michigan Probate Court on October 15, 1993 an Order Enjoining Petitioners from Prosecuting Duplicative Litigation (the "Anti-Suit Injunction") (Pet. App. 1a). That order permanently enjoined Petitioners from:

> a) filing, pursuing, or asserting any claims or suits in any court other than Ingham County Probate Court (or other than any appeals from the Ingham County Probate Court) that have been pled by Petitioners in the proceeding pending before this Court or have been pled by Petitioners in the case of *Judith L. Dart,* et al v. *William A. Dart,* et al Sarasota County Circuit Court No. 93-3084 CA-01 (the "Florida Suit"), and b) proceeding in any manner to prosecute, pursue or advance the first through the fifteenth causes of action and paragraph 171(c) in the

1. A key reason why the Florida Suit was filed in Florida in 1993 (as well as the subsequent Federal RICO Action) was that the Dart family and corporations relocated from Michigan to Florida shortly after the 1986 corporate reorganization. In 1993, before the federal RICO action was filed and during the pendency of the State court actions in Michigan and Florida, defendants Kenneth Dart, Robert Dart and Richard Rastall renounced their United States citizenship and fled this country, presumably with most or all of their United States assets. Discovery into the status and locus of these assets was denied by the Ingham County Probate Court in an order, see Pet. App. 79a. These developments too prompted the filing of the Federal RICO Action.

> sixteenth cause of action in their First Amended Complaint in the Florida suit, whether in the trial court or on appeal.

See In re The William F. Dart Trust, Order of October 15, 1993, included at Pet. App. 1a.

In response to the Anti-Suit Injunction, Petitioners indefinitely stayed proceedings in the Florida State Court Suit.

Subsequent appeals of this injunction were unsuccessful, but are not at issue in this Petition.

After the Order enjoining the Florida State Court Suit was entered by the Ingham County Probate Court, and while that Order was being appealed, petitioners' counsel became aware that a significant meeting had occurred between Thomas Dart and his father, W.A. Dart, on or about July 11, 1990, regarding the facts underlying potential RICO claims. Petitioners believed in good faith that the initiation of a federal RICO action for money damages would ***not*** violate the Michigan court's Anti-Suit Injunction, because that Injunction, on its face, barred only the prosecution of enumerated claims that had been asserted in the Michigan Action and in the Florida State Court Suit, and it is undisputed that Petitioners had ***not*** asserted any federal RICO claim in either state court proceeding at the time the Anti-Suit Injunction was entered. In any event, Petitioners could not afford to delay filing their federal RICO action to seek "clarification" of the Anti-Suit Injunction, because any delay beyond July 11, 1994 would give rise to a non-frivolous statute of limitations defense. It was highly unlikely that Petitioners could obtain an authoritative "clarification" of the Anti-Suit Injunction prior to the critical date of July 11, 1994.

Accordingly, on July 8, 1994, Petitioners filed a Complaint (Pet. App. 8a) in the United States District Court for the Middle District of Florida, alleging violations of 18 U.S.C. 1962(b) (Count I) and 18 U.S.C. 1962(a) (Count II) (the "Federal RICO Action"). The Complaint alleged that a RICO enterprise, including W.A. Dart, Kenneth Dart and Robert Dart, violated federal criminal law by engaging in an ongoing pattern of racketeering activity, including multiple acts of mail

and wire fraud, directed against Petitioners. The only relief sought in the Federal RICO Action was money damages. Petitioners' objectives in filing the Federal RICO Action were to toll the limitations period for Petitioners' federal RICO claims, and to preserve Petitioners' right to pursue those claims in a federal forum.

After filing the Federal RICO Action, Petitioners immediately sought and obtained a temporary stay in the Florida federal court of those proceedings. The stay, which was entered by Order dated August 23, 1994 (Pet. App. 5a) effectively relieved the defendants from even having to retain counsel for that matter — and indeed, no counsel entered appearances for any defendant in that case. On their own initiative, Petitioners advised the Ingham County Probate Court of the filing of the Federal RICO Action. *See* Pet. App. 4a (Letter from Merrill Davidoff to Judge Owens of the Ingham County Probate Court, dated 7/14/94).

On July 29, 1994, respondents Kenneth B. and Robert C. Dart secured the ex parte issuance of a Rule to Show Cause why Petitioners should not be held in civil and criminal contempt for filing the Federal RICO Action.

On or about August 15, 1994, petitioners filed a response to the Rule to Show Cause, explaining, *inter alia,* that the filing of a federal claim, in a federal court with jurisdiction over the parties, is protected by the Supremacy Clause of the United States Constitution and cannot be the basis for any punitive action by any state court regardless of whether related claims are pending in that court; neither can the prosecution of such an action be enjoined by a state court. *Donovan v. City of Dallas,* 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964), *reh'g denied,* 379 U.S.871 (1964); *General Atomic Co. v. Felter,* 434 U.S. 12, 18-19, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977).

On August 17, 1994, the day before the hearing on their contempt motion, respondents served a reply brief arguing that the Federal RICO Action was an *in rem* or *quasi in rem* proceeding that did not fall within the rule articulated in *Gen-*

eral Atomic and *Donovan, supra,* and that the Ingham County Probate Court was therefore empowered to enjoin the Federal RICO Action.

During the contempt hearing on August 18, 1994, petitioners' counsel sought leave to brief or argue the issue of whether the Federal RICO Action was an *in rem* or *quasi in rem* proceeding, or an *in personam* action. See Pet. App. 67a-69a. Petitioners contended that the Federal RICO Action was an *in personam* action, because it sought only money damages against the named defendants, and did not require the federal district court to obtain possession or control over particular assets, to involve itself in the internal administration of the trusts, or to afford any other kind of relief which would entail the exercise of *in rem* or *quasi in rem* jurisdiction. Petitioners also argued that the United States District Court for the Middle District of Florida should in the first instance be given the opportunity to characterize the Federal RICO Action and to decide its own jurisdiction.

The Ingham County Probate Court refused to permit petitioners' counsel to brief or argue this issue, and peremptorily ruled that the Federal RICO Action was either *in rem* or *quasi in rem* (the court did not stop to determine which) and therefore did not fall within the rule articulated in *General Atomic* and *Donovan. See* Pet. App. 70a. The court went on to hold that the filing of the Federal RICO Action violated the October 15, 1993 Order — even though (1) that Order only purported to enjoin actions which asserted the same claims which had theretofore been asserted in the Michigan Action and the Florida State Court Suit; (2) at the time the Injunction was entered, no Federal RICO claim had been asserted in either the Michigan Action or the Florida State Court Suit; (3) the only claims asserted in the Federal RICO Action were Federal RICO claims; and (4) petitioners vigorously asserted that the Federal RICO Action was strictly *in personam* in character. Pet. App. 71a-75a. While finding Petitioners in contempt of court, Judge Owens deferred "sentencing" Petitioners until October 14, 1994, in order to give Petitioners an opportunity to purge themselves of the asserted contempt. An Order Finding Petitioners Thomas J. Dart and Judith L. Dart

In Civil Contempt of Court was entered by the Probate Court on September 16, 1994. *See* Pet. App. 52a.[2]

In order to make it absolutely clear that jurisdiction in the Federal RICO Action was entirely *in personam*, and not *in rem* or *quasi in rem*, Petitioners moved the federal district court for an order dismissing their claims against the trust defendants T-1, T-2 and T-3, and the trustee of the three trusts. The federal district court granted the motion on October 13, 1994. *See* Pet. App. 53a.

At the sentencing hearing on October 14, 1994, Petitioners' counsel (Cravath, Swaine & Moore) informed the probate court that the trusts and the trustee had been dismissed from the Federal RICO Action in an effort to comply with the probate court's contempt determination. Despite this alteration in the pleadings, the probate court concluded that the trusts and the Trustee were still involved and found that the Petitioners had not purged themselves of the contempt. *See* Pet. App. 76a-78a. In order to avoid indefinite imprisonment, Petitioners were forced to enter a "voluntary" dismissal of the Federal RICO Action. Pet. App. 56a-60a.

The "voluntary" dismissal was entered into pursuant to a stipulated order, signed by counsel for all parties and entered by Judge Owens in the Michigan Probate Action on October 17th, 1994 (just before sentencing). That Order directed petitioners to dismiss the Florida Federal Action but provided that "[s]uch dismissal shall be without prejudice as to all defendants in the [Florida] Federal Action and the statute of limitations shall be tolled as to the claims" in the Federal suit until 15 days after the completion of appellate review of the contempt finding, including specifically "the decision on any application for appellate review (by appeal, certiorari or otherwise) to the United States Supreme Court." Pet. App. 57a.

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2. In connection with its contempt ruling, the Michigan Probate Court also revoked the *pro hac vice* admission of Petitioners' counsel, Berger & Montague, effectively depriving Petitioners of their counsel of choice. Pet. App. 7a. Petitioners have unsuccessfully appealed the revocation of their counsel's *pro hac vice* admission within the Michigan court system, but have not sought a writ of certiorari on this issue.

The dismissal of the federal claims pursuant to this stipulated Order was the only way for petitioners to challenge the Probate Court's ruling without languishing in jail during the pendency of proceedings to attack the contempt finding.

Petitioners filed an application for leave to appeal the probate court's contempt finding with the Ingham County Circuit Court. The circuit court visually compared the complaints filed in the Florida State Court Suit and the Federal RICO Action; concluded that "[t]hey are the same claim" (Pet. App. 81a), and denied leave to appeal. Pet. App. 62a.[3] On April 7, 1995, the Michigan Court of Appeals denied leave to appeal on the merits. Pet. App. 63a. On November 29, 1995, the Michigan Supreme Court issued an Order denying Petitioners' Application for Leave to Appeal, stating somewhat cryptically, "we are not persuaded that the questions presented should now be reviewed by this Court." Pet. App. 64a, 65a.[4]

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3. The Michigan courts concluded that the Federal RICO Action involved the same "claims" as were asserted in the Florida State Court Suit because the two actions concerned the same conduct, transactions and occurrences. But the Anit-Suit Injunction clearly did not use the word "claim" in this manner: it expressly allowed Petitioners to proceed in the Florida State Court Suit on their claim for damages for emotional distress, even though the acts giving rise to that claim were exactly the same as the facts and deeds at issue in the rest of the complaint in the Florida State Court Suit and in petitions in the Michigan Action. Given that the Injunction on its face barred the prosecution of some but not all claims arising from a common nucleus of fact, it made no sense for the Michigan courts to conclude that the Injunction was intended to bar ***all*** claims arising from such facts.

4. It is not clear whether the Michigan Supreme Court meant by this comment that it regarded the contempt ruling as interlocutory, so that review might take place at some point in the future after a final judgment is entered in the Michigan Probate Court action, or whether the court was declining on the merits to disturb the lower court's ruling. Clearly, the contempt ruling was collateral to the main trunk of the Michigan Action. As noted, the intermediate Michigan courts denied Petitioners' applications to appeal the contempt ruling ***on the merits.***

What ***is*** clear is that Petitioners will have no meaningful opportunity for further review in the Michigan courts or elsewhere. Even assuming that the Michigan Supreme Court would be inclined to review the Probate Court's contempt order following the entry of a final judgment in the underlying Michigan Probate Court action, and even assuming the Michigan Supreme

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE THE RULINGS BY THE MICHIGAN COURTS CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT AND OF THE UNITED STATES COURTS OF APPEALS, AND BECAUSE THE STATE AND FEDERAL COURTS ARE DIVIDED ON THE PROPER APPLICATION OF THIS COURT'S DECISIONS

The rulings by the Michigan state courts conflict with the applicable decisions by this Court in *Donovan v. City of Dallas*, 377 U.S. 408 (1964), and *General Atomic Co. v. Felter*, 434 U.S. 12, 18-19 (1977), as well as with numerous decisions by various United States Courts of Appeals. Moreover, Petitioners submit that the present case involves important questions concerning the relationship between the respective powers of the state and federal courts. By barring Petitioners from prosecuting their federal claims in a federal forum, and by depriving a federal court of a meaningful opportunity to address the jurisdictional issue or to adjudicate the federal law claims, the

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Court were to reverse the contempt order at that time, Petitioners would still be irreparably deprived of their right to litigate their Federal RICO claim in federal court. This is because the entry of an adverse final judgment in the Michigan Probate Court would collaterally estop Petitioners from relitigating any common factual issues in a re-filed Federal Action.

A grant of a writ of certiorari in the present case is supported by this Court's ruling in *General Atomic*. There, as in the present case, a state court had enjoined proceedings in parallel federal court actions, and had imposed contempt sanctions for a violation of that injunction. In *General Atomic* and in the present case the high court of the state in question refused to disturb the injunction or the contempt ruling. Upon consideration of the petition for certiorari in *General Atomic*, the court specifically noted that "there is no final state court judgment, since [the underlying state court action] has not yet been tried." *Id.*, 434 U.S. at 117. Nevertheless, the Court observed that the petitioner's "opportunity to fairly litigate the various claims arising from this complex action would be substantially prejudiced if the injunction were allowed to stand." *Id.*, 434 U.S. at 17-18. Accordingly, the Court not only granted certiorari, but summarily reversed the state court decision in a *per curiam* opinion.

Michigan courts have frustrated a right explicitly conferred by Congress, and have subverted the judicial power of the United States.

1. Petitioners' Exercise of Their Federal Right to Sue *In Personam* In Federal Court, Expressly Granted them by Federal Statute, Cannot Be Enjoined By A State Court.

When Congress enacted RICO, it authorized the victims of the acts proscribed by that statute to sue in federal court. 18 U.S.C. §1964(c). The same right is recognized more generally by 28 U.S.C. §1331, which authorizes suit in federal court in cases presenting federal questions, as petitioners' RICO complaint clearly does.

Under the Supremacy Clause of the United States Constitution, a state court cannot deprive an individual of his or her right to bring suit in a federal court. *Donovan v. City of Dallas,* 377 U.S. 408 (1964). In *Donovan,* the Court emphatically declared that state courts are utterly without power to interfere with the prosecution of *in personam* actions in Federal Court:

> While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that ***state courts are completely without power to restrain federal-court proceedings in in personam actions. . . . And it does not matter that the prohibition . . . was addressed to the parties rather than to the federal court itself.*** For the heart of the rule as declared by this Court is that:
>
> "*** where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. *** The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum."

> Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they presented, and to appeal to the Court of Appeals from the District Court's dismissal. They have been punished both for prosecuting their federal-court case and for appealing it. They dismissed their appeal because of threats to punish them more if they did not do so. The legal effect of such a coerced dismissal of their appeal is not now before us, but the propriety of a state court's punishment of a federal-court litigant for pursuing his right to federal-court remedies is. That right was granted by Congress and cannot be taken away by the State. ***The [state] courts were without power to take away this federal right by contempt proceedings or otherwise.***

Donovan, 377 U.S. at 412-414 (emphasis added) (citations omitted).

In *General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977), the Court reaffirmed the rule articulated in *Donovan*, and clarified that that rule applies regardless of whether the federal *in personam* action was pending or prospective at the time the state court injunction was entered.

In support of its contempt ruling, the Ingham County Probate Court improperly relied on *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939). In that case, certain beneficiaries of a trust brought an action in a federal district court seeking, among other things, an accounting of the subject trusts; removal of the trustee; and the requirement of a performance bond on the part of the trustee. *Id.* at 465. This prayer for relief set up a collision with the Pennsylvania Court of Common Pleas, which already was exercising jurisdiction over the administration of the trust. *See Id.* The Court analyzed the problem as follows:

> Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may

> proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other.

305 U.S. at 465-466 (citations omitted). Since the federal action at issue in *Princess Lida* sought relief which characterized it as *in rem,* or *quasi in rem*, and since the trust assets in question were already subject to the exclusive jurisdiction of the Pennsylvania court, the federal action was constrained to yield. *See Id.* at 467-468.

Here, the Ingham County Probate Court sought to force Petitioners' Federal RICO Action within the *Princess Lida* doctrine by simply declaring that Action to be *in rem* or *quasi in rem*. This ruling constitutes clear error in at least two respects. First, the Michigan court exceeded its authority in even attempting to determine whether the claims asserted in the Federal RICO Action were *in personam*, *in rem* or *quasi in rem*. Petitioners submit that it was up to the federal court to characterize the claims before it and to determine whether to exercise jurisdiction over those claims.

Second, the Michigan court's characterization of the Federal RICO Action was substantively incorrect. As discussed below, the Federal RICO Action was in fact an *in personam* action which would not in any way have interfered with the Michigan court's jurisdiction over the trust assets.

2. The Federal and State Courts Are Divided On Whether Federal Or State Law Controls In Determining Whether Pending Actions Are *In Personam, In Rem,* Or *Quasi In Rem.*

In *Markham v. Allen*, 326 U.S. 490 (1946), this Court explained that the power of a federal court to proceed, even when potentially in conflict with a state court action, is necessarily controlled by federal law:

> it has been established by a long series of decisions of this Court that federal courts of equity have jurisdiction to entertain suits "in favor of creditors, legatees and heirs" and other claimants against a decedent's estate "to establish their claims" so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.
>
> Similarly while a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, it may exercise its jurisdiction to adjudicate rights in such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.

Similarly, this Court held in *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 44 (1909) that federal courts are empowered to proceed "notwithstanding the statutes of the state[s] [that] undertake to give to state probate courts exclusive jurisdiction over all matters concerning the settlement of accounts of executors and administrators in the distribution of estates." That holding, we submit, is a necessary result of the command in the Supremacy Clause that federal law controls when inconsistent with state law.

The lower courts, both state and federal, have badly divided, however, in applying these principles under this Court's decision in *Princess Lida.* For example, in *Southwestern Bank & Trust Co. v. Metcalf State Bank,* 525 F.2d 140 (10th Cir. 1975), the defendant contended that the competing actions in federal and state court were both in the nature of actions in *rem*, so as to fall within the *Princess Lida* doctrine. The state statute which gave rise to the claims explicitly declared that "all actions hereunder are declared to be proceedings in rem." *Id.* at 141. Nevertheless, the Tenth Circuit applied its own analysis, apparently based on federal common law, to determine the character of each of the competing actions. The court noted:

> 60 O.S.A. §175.23, quoted in part above, characterizes any action brought under that section as an action *in rem*. Such a designation by statute does not make a suit in rem which is not in fact of such nature.

Id. at 142.

Similarly, in *Bergeron v. Estate of Loeb*, 777 F.2d 792, 799 (1st Cir. 1985), the First Circuit applied federal law to conclude that state law claims in a federal diversity action were *in personam*, and would be allowed to proceed.

By contrast, the Ninth Circuit in *Knaefler v. Mack*, 680 F.2d 671, 675-676 (9th Cir. 1982), allowed state law to control its determination that a state law ejectment action, which was in federal court on diversity jurisdiction, was an *in personam* action. See also *Signal Properties, Inc. v. Farha*, 482 F.2d 1136, 1137 (5th Cir. 1973) (applying state law to determine the character of state law claim pending in federal court).

Here, the Michigan courts appear to have applied (at best) their own state-law concepts of *in rem, quasi in rem* and *in personam* jurisdiction to characterize the federal law RICO claims which Petitioners brought in federal court. Whatever the wisdom of allowing state law to govern the characterization of a state law cause of action, there is no warrant for allowing a state court applying state law to impede or determine a federal court's jurisdiction over federal law claims. Petitioners' federal RICO claims were exclusively for money damages, and the Probate Court's determination that the action was *in rem* or *quasi in rem* was therefore incorrect regardless of which body of law applies. But the Probate Court's willingness to characterize — and then cut off — Petitioners' federal claims was erroneous, not only because it was wrong on the merits, but because the application of state law to determine the nature of a federal claim necessarily endangers the supremacy of federal law ensured by the Supremacy Clause.

3. The Court Below Is Virtually The Only State Court Construing *Princess Lida* To Authorize A State Court Injunction Barring Prosecution Of A Federal Proceeding

The cases construing *Princess Lida* to bar the prosecution of a federal claim come almost exclusively from federal courts: clearly, under established abstention principles as enunciated in, e.g., *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), federal courts are authorized to make this determination. See, *e.g., Bergeron v. Estate of Leob,* 777 F.2d 792 (1st Cir. 1985) (applying rule in *Princess Lida* along with the *Colorado River* factors to determine that diversity proceeding could go forward in federal court notwithstanding pendency of state court probate proceeding).

It is a very different, and far more troubling matter, however, for a ***state*** court to take it upon itself to bar prosecution of a federal claim in federal court. The potential for interference with the supremacy of federal law is clear: this is particularly the case when the state court decides to bar prosecution of the federal court action on the basis of its own, state law conception of the nature of both the action before it and the case pending in federal court. That, however, is exactly what the Michigan Probate court did.

It is true that in *Princess Lida* this Court upheld a state-court injunction against *in rem* proceedings in the federal court. But that was 57 years ago. *Princess Lida* was decided before federal courts had developed doctrines of abstention. And it was decided before *Donovan* and *General Atomic* had announced a clear hands-off policy against state courts enjoining federal proceedings.

It is as true now as it was when *Princess Lida* was decided that a federal court cannot take jurisdiction of an action *in rem* if a state court already is exercising jurisdiction over the res. But this is something that the federal courts can and must decide for themselves. They must decline jurisdiction if to hear a case would be to interfere with a state court's control over the property, but they must exercise jurisdiction, unless abstention is justified by the principles announced in *Colorado River Water Conservation District v. United States,* 424 U.S. 800

(1976), if they conclude that the suit before them is *in personam*. It is clear from *Donovan* and *General Atomic* that "the rights conferred by Congress to bring *in personam* actions in federal court are not subject to abridgment by state-court injunctions," *General Atomic*, 434 U.S. at 17. That rule cannot be evaded by allowing a state court to apply its own idiosyncratic notions and to decide for itself that the federal action is *in rem* or *quasi in rem*.[5]

It is not surprising that the decision below is the first instance since *Princess Lida*, so far as we can find, in which state courts have construed that case to allow a state-court injunction and contempt to compel dismissal of a claim in federal court.[6] State courts have understood that *Princess Lida* allows concurrent prosecution of federal and state court action; and they have construed it to require their own dismissal of state court proceedings in deference to a pending federal case. *Aysseh v. Lawn*, 180 N.J. Super. 391, 434 A.2d 1146 (1981). And federal courts have construed the doctrine to allow or prevent federal prosecution of an action, and to bar or permit prosecution of state court claims. What no state court appears to have done before the action by the courts below is to construe *Princess Lida* to allow the state court to use its contempt power and its power to imprison to compel dismissal of a federal claim in federal court.

4. The Decision Below Is Incorrect On The Merits, Because Petitioners' Federal RICO Claim Is *In Personam*

Here, Petitioners' Federal RICO Action ***only*** asserted federal RICO claims for ***money damages***. The damages sought are fungible, and need not be paid out of any particular trust. No interpretation or enforcement is sought of any trust instrument or law, and there is no effort to enforce any legal duty of a trustee or fiduciary. No relief is sought with respect to

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5. That on occasion state courts will try to assert power that they clearly do not have is shown by the subsequent history of the *General Atomic* litigation. See *General Atomic Co. v. Felter*, 436 U.S. 493 (1978).

6. In *Moody v. Alabama*, 295 Ala. 299, 329 So.2d 73 (1976) the injunction related only to frivolous federal claims already rejected by the federal court or otherwise clearly barred.

administration or disposition of any specific *res*, such as trusts. The RICO claims are based on defendants' commission of mail and wire fraud in violation of federal law (specifically 18 U.S.C. §§1341 and 1343) in connection with the 1986 reorganization. In light of the authorities discussed above, Petitioners' claims in the Federal RICO Action were clearly *in personam* in nature. Any conceivable doubt on this point was necessarily resolved when Petitioners amended their Federal RICO Action to dismiss the claims against the trusts (T-1, T-2 and T-3) and the trustee (Dart Financial Corp.). The elimination of the claims against the trusts and the trustee dispelled any possible illusion on the part of the probate court that the adjudication of the Federal RICO Action would have required the federal district court to exercise even indirect control over the trust assets.

The Probate Court purported to rely on the Tenth Circuit's decision in *Cassity v. Pitts*, 995 F.2d 1009 (1993), but its holding cannot in fact be so grounded. First, if the *Cassity* opinion actually said what the Probate Court read it to say, it would conflict starkly with the overwhelming weight of the authorities. But the *Cassity* opinion is in fact uneventful, and stands for two propositions that are consistent with petitioners' argument here: first, that the determination of the nature of the actions is for the federal court; and second, that a federal action cannot proceed if it will interfere with the actual administration of the trust.[7]

Even assuming *arguendo* that Petitioners' Federal RICO claims might require the district court to determine petitioners' interests in the trusts or to construe the trust instruments, the state courts were still utterly without power to restrain the Federal RICO Action. Numerous courts have specifically held

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7. In *Cassity*, the plaintiffs, also beneficiaries of a trust at issue in a state proceeding, brought a federal RICO action "seeking relief against Trustees for their administration of the trust and fraud. . . . Beneficiaries also sought a declaration that the trust was void." *Id.* at 1011. The Tenth Circuit court of appeals focused specifically on the nature of the relief sought in the federal case, holding that "[t]he relief requested by the Beneficiaries would require the trial court to construe the trust and define the duties, obligations and responsibilities of the Trustees." *Id.* at 1012.

that federal actions for money damages against trustees for mismanagement and breaches of trust may proceed without affecting a state court's control or supervision of the trust. For example, in *Southwestern Bank & Trust Co. v. Metcalf State Bank*, 525 F.2d 140 (10th Cir. 1975), bondholders brought a federal court action seeking damages against a bank, which was acting as trustee pursuant to a mortgage indenture and trust agreement with the city industrial authority relevant to the bonds, alleging breach of contract and breach of fiduciary duty while a suit was pending in state court to liquidate the trust. The court defined *in rem* actions as those actions which "are of such a nature as to require possession or control of the subject matter in order to grant the relief requested." *Id.* at 142. The court noted that (1) the federal allegations related entirely to the administration of the trust by the trustee, and the performance of the trustee's obligations under the trust, and (2) the plaintiff sought money damages in the form of disbursement of the proceeds from the sale of the bonds. *Id.* at 142-143. Unlike actions wherein a removal of the trustee is sought, the federal action

> does not depend in any way upon possession or control of the trust assets for its determination or for the granting of any relief. There is thus no interference with the "possession" by the state court. . . . It can proceed against the defendant without interfering with the state suit or with the res of the trust.

Id. at 143.

In *Rogers v. Girard Trust Co.*, 159 F.2d 239 (6th Cir. 1947), plaintiff, beneficiary of a trust, filed a federal court action seeking money damages against the trust company and the trustee for negligence, mismanagement of the trust, and breaches of the terms of the trust. The Orphans Court in Philadelphia had previously handled the account and the application for partial distribution. The Sixth Circuit, in allowing the federal action to stand, stated:

> The action clearly is in personam. There is no prayer for removal of the trustee or for accounting. The simple

> question of a right to damages for fraud and wrongful performance of fiduciary duty is presented. The action does not in any way affect the possession of and control over the res by the Orphans Court. Since it is suit to establish a personal right against a fiduciary, the District Court clearly has jurisdiction
>
> . . . [T]he effect of the judgment of the federal court here, if it be in favor of the appellant, will leave undisturbed the orderly administration of the estate in the Orphans Court of Philadelphia County.

Id. at 242 (citations omitted).

Similarly, in *Powell v. American Bank & Trust Co.*, 640 F. Supp. 1568 (N.D. Ind. 1986), a state court had approved the sale of stock held in trust. Beneficiaries filed a federal action alleging fraud, breach of fiduciary duty, violations of RICO, and violations of the Securities Exchange Act. There were three RICO counts: in one, the enterprise was the trust; in another, the enterprise was the trustee. The court found that the federal court had *in personam* jurisdiction over the action because

> [t]he essence of the complaint is that the defendants defrauded the plaintiffs in a stock sale; it just so happens that the stock was the corpus of a testamentary trust. Yet because the plaintiffs do not seek to rescind the sale, but rather want only to get the value of the stock which they were not paid, there is no interference with the [state] [c]ourt's administration of the Trust.
>
> . . . Here, the relief sought is completely different [from that sought in the state court's administration of the trust], and there will be no interference with the jurisdiction or control over the Trust exercised by the state court. The court finds that the [*Princess Lida*] exception is simply inappropriate here.

Id. at 1575 n.1.

The same result was reached in *Mooney v. Fidelity Union Bank*, No. 82-3192, 82-3193 (D.N.J. March 10, 1983). There, the federal court was presented with a RICO count, a claim

under the National Bank Act, and common law claims for fraud and breach of contract. Although a mortgage foreclosure action was already on file in state court related to the exact same transaction, the federal court refused to dismiss:

> [R]esolution of these claims would in no way require this court to exercise jurisdiction over real property, nor is control over such real property the basis for this court's subject matter jurisdiction over these claims. 28 U.S.C. §1337. Thus it is clear that these claims are purely in personam in nature. The pendency of a state court in rem proceeding (or even a state court in personam proceeding) in no way limits the power of a federal district court to determine in personam claims.

Id. (citations omitted).[8]

In contrast to the foregoing authorities, the claims which Petitioners asserted in the Federal RICO Action would not even have required the federal court to interpret any trust instruments or to define or enforce any legal duty of a trustee thereunder. Since Petitioners' RICO claims in the Federal RICO Action were *in personam* claims which would not require the federal district court to interfere with the Michigan

---

8. *See also Beach v. Rome Trust Co.*, 269 F.2d 367, 372 (2d Cir. 1959) (fact that estate and testamentary trust were in process of administration in state Surrogate's Court and that accounting had not yet been had did not preclude federal jurisdiction of beneficiary's claims to legal ownership of assets and claim based on asserted breach of trust by trust company); *Martz v. Braun*, 266 F. Supp. 134 (E.D. Pa. 1967) (federal court had jurisdiction over subject matter of suit where beneficiary of testamentary trusts sued the trustees personally for damages allegedly suffered as a result of the trustee's breach of duty, since such claims were far removed from direct interference with the trust itself); *Silberman v. Worden*, No. 87 C 8368, 1988 U.S. Dist. LEXIS 10455 (N.D. Ill. Sept. 15, 1988) (federal court claims against a trustee for money damages based on, *inter alia*, alleged breach of fiduciary duty and breach of contract were *in personam* claims not subject to the *Princess Lida* exception); *Stewart Sec. Corp. v. Guaranty Trust Co.*, 71 F.R.D. 32, 33 (W.D. Okl. 1976) ("state [c]ourt's prior *in rem* jurisdiction over the *res* of a trust in an action to administer a trust did not preclude a subsequent Federal diversity action to surcharge the trustee of that trust" for misfeasance), *citing, Southwest Bank & Tr. Co. etc. v. Metcalf St. Bank*, 525 F.2d 140 (10th Cir. 1975).

court's possession or control of the trusts, the Michigan court was and is without power to enjoin or otherwise interfere with Petitioners' prosecution of those claims in the federal court. To the extent that the Anti-Suit Injunction bars the prosecution of these claims, the Injunction is illegal and unenforceable, through contempt or otherwise. The Michigan court's ruling is directly contrary to this Court's holdings in *Donovan* and *General Atomic* and is in no way justified by the doctrine articulated in *Princess Lida.*

CONCLUSION.

For the foregoing reasons, the Court should grant the instant Petition, and should issue a writ of certiorari to review the decision of the Michigan court.

Dated: February 27, 1996

Respectfully submitted,

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APPENDIX

STATE OF MICHIGAN

IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE WILLIAM F. DART TRUST — File No. G-6372 Hon. Donald S. Owens

ORDER ENJOINING PETITIONERS THOMAS J. DART AND JUDITH L. DART FROM PROSECUTING DUPLICATIVE LITIGATION

At a session of Court held in the Courthouse, City of Lansing, County of Ingham, and State of Michigan, on the 15th day of October, 1993.

PRESENT: HONORABLE DONALD S. OWENS,
Probate Court Judge

The Court has duly considered the parties' written submissions and oral arguments concerning the motion of Respondents William A. Dart, Claire T. Dart, and Dart Financial Corporation ("Trustee Respondents") to enjoin Thomas J. Dart and Judith L. Dart ("Petitioners") from prosecuting duplicative litigation in Florida. The T-2 and T-3 Beneficiary Respondents — Kenneth B. Dart and his family and Robert C. Dart and his family — concurred in the motion.

The reasons for issuing this Injunction and Order were stated on the record at the hearings on September 29 and October 15, 1993, and those reasons are incorporated in this Order by reference pursuant to MCR 3.310(C)(1). So, for the reasons stated on the record on September 29, and October 15, 1993;

IT IS HEREBY ORDERED that Petitioners are permanently enjoined from: a) filing, pursuing, or asserting any claims or suits in any court other than Ingham County Probate Court (or other than any appeals from the Ingham County Probate Court) that have been pled by Petitioners in the proceeding pending before this court or have been pled by Petitioners in the case of *Judith L. Dart,* et al v *William A. Dart,* et al Sarasota County Circuit Court No. 93-3084 CA-01 (the

"Florida suit"), and b) proceeding in any manner to prosecute, pursue or advance the first through the fifteenth causes of action and paragraph 171(c) in the sixteenth cause of action in their First Amended Complaint in the Florida suit, whether in the trial court or on appeal.

DONALD S. OWENS

HONORABLE DONALD S. OWENS,
Probate Court Judge

A TRUE COPY:

JEANIE LEYDEN OWENS

DEPUTY REGISTER of
PROBATE DIVISION

STATE OF MICHIGAN
PROBATE COURT FOR THE COUNTY OF INGHAM
PROBATE DIVISION

****
IN THE MATTER OF THE
WILLIAM F. DART TRUST File No. G-6372
****

ADDENDUM TO OPINION

At a session of said court held in the
City of Lansing, County of Ingham, State of Michigan
on October 18, 1993

PRESENT: Hon. DONALD S. OWENS, Judge of Probate

At the October 15, 1993, hearing on the Trustee Respondents' Motion for Settlement and Entry of Injunctive Order, the Court attempted to clarify its opinion of September 29, 1993 and applied that clarified opinion to an analysis of which causes of action in the Florida Suit should properly be enjoined by the Court and which should not. In the course of that clarification, the Court focused on the recent (1989) expansion of the exclusive jurisdiction of the probate court to hear matters involving trusts (MCL 700.21(b)). The Court may not have sufficiently clarified its opinion concerning its concurrent jurisdiction under MCL 700.22 over trust matters not within the Court's exclusive jurisdiction.

Therefore, it is the Court's opinion that to the extent the petitioners have claims against the respondents arising out of the transactions or occurrences that are the subject matter of In the Matter of the William F. Dart Trust, Ingham County File No. G-6372, and which are within the concurrent, but not exclusive, jurisdiction of this court, those claims must be pled in this court as required by the Michigan compulsory joinder rule (MCR 2.203(A)). To the extent they are pled in any court other than the Ingham County Probate Court, the petitioners are subject to being enjoined by this court from prosecuting, pursuing or advancing any such claims.

/s/ Donald S. Owens
DONALD S. OWENS, Judge of Probate

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July 14, 1994

VIA UPS OVERNIGHT

Honorable Donald S. Owens
Ingham County Probate Court
303 West Kalamazoo Street
Lansing, MI 48933

Re: In the Matter of William F. Dart Trust
File No. G-6372

Dear Judge Owens:

I write to advise your Honor that petitioners in the above-captioned matter have commenced an action in the United States District Court for the Middle District of Florida stating claims under the Racketeer Influenced and Corrupt Organizations Act similar to those stated in the Amended Petitions and Complaint recently filed in this case. Simultaneously, petitioners have moved to stay that federal action pending this Court's clarification of its injunction and the scope of its jurisdiction to hear those claims.

For the Court's convenience I enclose a copy of the federal complaint and of plaintiffs' motion and proposed Order for a temporary stay.

Respectfully,

Merrill G. Davidoff

MGD/ct
enc.
cc: All Counsel

RECEIVED AUG 29 1994
FILED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

94 AUG 24 AM 7:58
CLERK OF DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

THOMAS J. DART, and
JUDITH C. DART, individually
and derivatively on behalf of
DART ENERGY CORPORATION,
Plaintiffs,

vs. Case No. 94-1083-Civ-T-24(C)

W.A. DART, KENNETH DART,
ROBERT DART, CLAIRE DART,
THE KENNETH B. DART RESIDUAL
TRUST, THE ROBERT C. DART
RESIDUAL TRUST, BENJAMIN O.
SCHWENDENER, RICHARD J.
RASTALL, DART FINANCIAL CORP.,
AMERICAN APPRAISAL ASSOCIATES
d/b/a STANDARD RESEARCH
CONSULTANTS,
Defendants,

and

DART ENERGY CORP. and THE
THOMAS J. DART RESIDUAL TRUST,
Nominal
Defendants.

ORDER

On July 15, 1994, the Court denied without prejudice Plaintiffs' Motion to Stay Proceedings for failure to comply with Local Rule 3.01(g), M. D. Fla. (Doc. No. 13). Plaintiffs filed a Renewed Motion to Stay Proceedings and Incorporated Memorandum on July 5, 1994 (Doc. No. 14). No response was filed thereto.

The Court having considered the Motion and otherwise being fully advised, it is **ORDERED AND ADJUDGED** that:

(1) Plaintiffs' Renewed Motion to Stay Proceedings (Doc. No. 14) is **GRANTED.**

(2) This action is hereby **STAYED** for **ninety (90) days.**

(3) The Clerk is directed to administratively **CLOSE** this case.

(4) Plaintiffs are directed to file and serve, **on or before Friday, December 2, 1994,** a report regarding the status of this action as well as the related actions identified by Plaintiffs which are pending in other courts.

DONE AND ORDERED at Tampa, Florida, this 23 day of August, 1994.

/s/ Susan C. Bucklew
SUSAN C. BUCKLEW
United States District Judge

Copies to:

Counsel of Record

Law Clerk
Courtroom Deputy

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE
WILLIAM F. DART TRUST Probate Court No. G-6372

ORDER WITHDRAWING THE *PRO HAC VICE* ADMISSION OF MERRILL G. DAVIDOFF, JEROME M. MARCUS, AND BART D. COHEN

At a session of said Court, held in the Probate Courtrooms, City of Lansing, County of Ingham, State of Michigan, this 9th day of Sept., 1994.

PRESENT: HONORABLE DONALD S. OWENS,
PROBATE JUDGE

This Court granted *pro hac vice* admission to Merrill G. Davidoff, Jerome M. Marcus and Bart D. Cohen with regard to the above-captioned proceeding. The T-2 and T-3 Beneficiary Respondents filed a motion for reconsideration regarding that *pro hac vice* admission. Petitioners filed a response to that motion. The parties presented oral arguments on the motion to this Court on August 19, 1994;

NOW, THEREFORE, for the reasons stated by the Court on the record at the August 19, 1994 hearing;

IT IS HEREBY ORDERED that Respondents' Motion for Reconsideration Regarding the *Pro Hac Vice* Admission of Merrill G. Davidoff, Jerome M. Marcus and Bart D. Cohen is granted, and those *pro hac vice* admissions are withdrawn. Petitioners' oral request to file additional briefs is denied.

DONALD S. OWENS
Honorable Donald S. Owens
Ingham County Probate Judge

A TRUE COPY
DONALD S. OWENS
JUDGE OF PROBATE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

THOMAS J. DART, JUDITH C. DART, individually and derivatively on behalf of DART ENERGY CORPORATION,	:	COMPLAINT
Plaintiffs,	:	CIVIL ACTION NO. 94-1083-CIV-T-24(c)
v.	:	
W.A. DART, KENNETH DART, ROBERT DART, CLAIRE DART, THE KENNETH B. DART RESIDUAL TRUST, THE ROBERT C. DART RESIDUAL TRUST, BENJAMIN O. SCHWENDENER, JR., RICHARD J. RASTALL, ALAN VALADE, DART FINANCIAL CORPORATION, DART CONTAINER CORPORATION, AMERICAN APPRAISAL ASSOCIATES d/b/a STANDARD RESEARCH CONSULTANTS,	:	JURY TRIAL DEMANDED
Defendants,	:	
and DART ENERGY CORPORATION and THE THOMAS J. DART RESIDUAL TRUST,	:	
Nominal Defendants.	:	

Plaintiffs Thomas J. Dart and Judith L. Dart, for their Complaint, represent as follows:

1. Plaintiffs Thomas J. Dart and Judith L. Dart are interested in this matter as beneficiaries of T-1, one of the trusts identified below.

2. All interested parties have copies of the various trust documents (which are more fully described below) and those documents are therefore not attached to this Complaint as exhibits.

JURISDICTION AND VENUE

3. This Court has jurisdiction of this matter by operation of 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331.

4. Venue is appropriate in this district pursuant to 18 U.S.C. § 1965(c), and 28 U.S.C. § 1391(b), because defendants W.A. Dart, Claire Dart, Dart Container Corporation, and Dart Financial Corporation, reside here.

THE TRUSTS

5. In March, 1974, Thomas J. Dart's grandfather, William F. Dart, established a Trust Agreement which was subsequently amended in its entirety by a Third Amendment, dated March 26, 1976. William F. Dart died on March 30, 1976.

6. The Trust Agreement called for a division upon William F. Dart's death of a portion of the trust property into three equal trusts, one for the benefit of Thomas J. Dart, his wife and children (T-1), one for the benefit of Kenneth B. Dart, his wife and children (T-2), and one for the benefit of Robert C. Dart, his wife and children (T-3). Those trusts were established, and funded, with substantially the same assets having substantially the same values. The principal assets of each trust consisted of minority stock interests in various family owned corporations. In 1978, William A. Dart, the only son of William F. Dart, the father of Thomas J., Kenneth B. and Robert C. Dart, the Trustee of T-1, T-2 and T-3, and the sole owner of all the issued and outstanding shares of common and preferred stock of Dart Management Corporation, sold all of his shares of common stock of Dart Management Corporation with one third of his shares each going to T-1, T-2 and T-3, but retained voting control through his continued ownership of Dart Management's voting preferred stock.

7. Dart Management was the family's holding company and owned subsidiary corporations that were engaged in at least two different businesses, viz., the plastic container business and the oil and gas business.

8. The assets in T-1, T-2 and T-3 remained approximately equal in value until 1986. During this period of time, no distributions were made from any of the trusts to any of the beneficiaries.

DEFENDANTS

9. Defendant W.A. Dart is the father of Thomas, Kenneth and Robert Dart and the son of William F. Dart, the settlor of T-1, T-2 and T-3. At all times material hereto, W.A. Dart has acted as the trustee of T-1, T-2 and T-3. From March, 1976 until October, 1989, W.A. Dart was the named trustee of T-1, T-2 and T-3 ("Trustee"). Thereafter, he purportedly substituted a company named Dart Financial Corporation (a defendant in this action) as Trustee. Dart Financial is owned equally by W.A. Dart and his wife, Claire Dart. W.A. Dart also serves as Dart Financial's president. Since October, 1989, W.A. Dart has continued to exercise fiduciary control over T-1 and the other trusts though his ownership of the substituted nominal Trustee, Dart Financial. In addition to his position as the direct and indirect fiduciary of T-1, W.A. Dart has served at all times material hereto on the board of directors of Dart Energy Corporation ("Dart Energy"). He is also Chairman of the Board of Directors of co-defendant Dart Container.

10. Defendant Claire T. Dart is the wife of W.A. Dart and the mother of Thomas, Kenneth and Robert Dart. Claire Dart is also a 50 percent shareholder of Dart Financial, the nominal Trustee. Claire Dart is named a defendant in order to permit the Court to grant effective relief to the plaintiffs in this action.

11. Defendant Kenneth B. Dart is an officer and director of Dart Container.

12. Defendant Robert C. Dart is an officer and director of Dart Container.

13. Defendant Dart Container is a Florida corporation which maintains its principal place of business in Sarasota, Florida.

14. Defendants T-2 and T-3 presently own all of the outstanding stock of Dart Container. T-2 and T-3 have substantial assets located within the State of Florida.

15. Defendant Dart Financial has been, as set forth in paragraph 9 above, the nominal Trustee of T-1 since October, 1989. Defendant W.A. Dart controls the operations of Dart Financial, which is the alter ego of W.A. Dart.

16. Defendant American Appraisal Associates, Inc. d/b/a Standard Research Consultants ("SRC") performed a valuation of Dart Container at the behest of W.A. Dart as part of the reorganization of Dart Container.

17. Defendant Benjamin O. Schwendener, Jr. is a director and vice president of Dart Container, corporate secretary of numerous Dart Container subsidiaries, and a director of Dart Financial. He served as legal counsel to Dart Container and as counsel to W.A. Dart individually and in his capacity as Trustee.

18. Defendant Richard J. Rastall served as legal counsel to Dart Container and to W.A. Dart, Claire Dart, Kenneth Dart and Robert Dart, both individually and as a member of Schwendener's firm.

19. Defendant Alan M. Valade at all material times hereto has been an associate of Schwendener's, served as legal counsel to Dart Container and to W.A. Dart, Claire Dart, Kenneth Dart, and Robert Dart individually.

20. Nominal Defendant Dart Energy Corporation is a Michigan corporation whose stock is presently owned entirely by T-1. Accordingly, Thomas Dart and Judith Dart are indirect beneficial owners of Dart Energy by virtue of their beneficial interest in T-1. Thomas Dart's three minor children are also beneficiaries of T-1. As such, they also have a beneficial ownership interest in Dart Energy. As more fully described below, Thomas Dart and Judith Dart assert certain claims herein derivatively on behalf of Dart Energy and are well-suited to represent in this litigation the interests of all of the beneficial owners of the Dart Energy stock held by T-1. Dart Energy is named as a nominal defendant in order to permit the Court to grant effective relief to the plaintiffs in this action.

21. Nominal Defendant T-1 is the trust in which plaintiffs Thomas Dart and Judith Dart each hold a beneficial interest. T-1 is named as a nominal defendant in order to permit the Court to grant effective relief to the plaintiffs in this action.

INTRODUCTION

22. Dart Container Corporation is the major producer of plastic "Styrofoam" cups.[1] Dart Container had annual revenues of hundreds of millions of dollars, and a present net worth of several billion dollars.

23. Dart Container is privately owned by the Dart family. It was founded by William F. Dart, who died in 1976. Since then, the Dart family business has been controlled by W.A. Dart, the son of William F. Dart. Until 1978, Dart Container was owned in equal shares by three trusts established by William F. Dart for each of his grandchildren (the three sons of W.A. Dart), Thomas Dart, Kenneth Dart, and Robert Dart. In 1978, the three trusts exchanged their stock in Dart Container for stock in a newly formed holding company, Dart Management Company. Thereafter, until the end of 1986, Dart Container, as the wholly-owned subsidiary of Dart Management, was indirectly owned in equal shares by the three trusts.

24. Thomas Dart founded Dart Energy Corporation in 1975, when he was 23 years old. Dart Energy enjoyed tremendous business success until the collapse of world oil prices in 1982. Dart Energy has continued in business since that time, but at greatly reduced levels. In the time period 1984-1986, Dart Energy had a fair market value of approximately $7.5 million. Up until December, 1986, Dart Energy was a wholly-owned subsidiary of Dart Management. As such, it was also indirectly owned in equal shares by the three trusts.

25. In 1986, the Dart companies were comprehensively reorganized. Prior to the reorganization, Thomas Dart's trust indirectly owned one-third of both Dart Container and Dart Energy, as did each of the other two trusts for Kenneth and Robert Dart. At the time, Dart Container was worth at least $300 million, as compared to Dart Energy's $7.5 million fair market value.

26. After the 1986 reorganization, the Thomas Dart's trust owned all of Dart Energy, and the other two trusts each owned one- half of Dart Container. Thomas Dart, who was 33 years old at the time, and his family were completely squeezed

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1. Polystyrene foam cups, such as those manufactured by Dart Container, are commonly known as Styrofoam cups. However, the term "Styrofoam" is a registered trademark of E.I. Dupont de Nemours & Company, and is not used by Dart Container to describe its products.

out of the crown jewel of the family business, and left with the least profitable and promising family company, Dart Energy.

27. Under the terms of the 1986 reorganization, an equalizing payment was to be made to recognize the disparity in value between 100 percent of Dart Energy, and one-third of Dart Container. The amount of the payment was to depend upon a subsequent determination of fair market value for each company.

28. Defendants W.A. Dart, Kenneth Dart, Robert Dart, Benjamin O. Schwendener, Jr., Richard Rastall, Alan Valade and SRC worked together to complete the 1986 reorganization, attempting thereby to achieve two goals: to remove Thomas Dart from the Dart Container business; and to do so for as small an amount of money as possible. To achieve these goals they made fraudulent misrepresentations to Thomas Dart regarding the value of the Container business; fraudulently misrepresented the nature and extent of consideration W.A. Dart, Ken Dart, and Robert Dart received pursuant to the 1986 reorganization; and fraudulently misrepresented the actual content of documents they sought to induce Thomas Dart to sign in an effort to immunize themselves from this fraud and from other violations of law alleged in other legal proceedings.

29. W.A. Dart knew that the values he assigned to Dart Container were false when he assigned them.

BACKGROUND

The Origin of the Dart Empire

30. Dart Container is the successor to Dart Manufacturing Company, founded by inventor and entrepreneur William F. Dart in 1937. Located in Mason, Michigan, the company started as a plumbing and heating supply business, evolving over the course of the next few decades into a machinery and welding business.

31. In 1951, defendant W.A. Dart joined his father, William F. Dart, in the business. The company began producing extruded plastic sheet in 1956, and in 1957 embarked on the development of what would prove to be a very profitable

product — the polystyrene foam or, as commonly known, plastic cup. As a result of these efforts, Dart Container has emerged as the world's largest manufacturer of plastic cups and related products. The success of Dart Container in the plastic cup business had been the primary source of the wealth held by the trusts involved in the present litigation.

32. Dart Manufacturing's commercial shipments of plastic cups began in 1960. Dart Manufacturing Company changed its name to Dart Container in 1963, at which time it began to discontinue all business activities not related to its plastic cup manufacturing operations. Over the course of the next three decades, Dart Container expanded its manufacturing operations into Florida, North Carolina, South Carolina, Pennsylvania, Georgia, Illinois, California, Texas, Kentucky, Canada and overseas. By 1984, Dart Container and its subsidiaries reported assets valued at in excess of $145,000,000, annual revenues in excess of $200,000,000, and annual net income in excess of $28,000,000.

33. Dart Container's prosperity continues to date. According to recently published Dun & Bradstreet reports, Dart Container and its subsidiaries have continued to enjoy hundreds of millions of dollars in annual revenues. Including Dart Container in its annual list of the largest privately held companies in the United States, Forbes Magazine estimated Dart Container's annual revenues at $464,000,000 in December, 1992, more than double its 1984 revenues and demonstrating literally exponential growth since the time Dart Manufacturing Company was started years ago with a $30,000 initial investment.

Creation of the Trusts

34. In March 1974, William F. Dart established a trust (the "Initial Trust") in which he named himself as trustee and the Bank of Lansing (Michigan) as successor trustee. The Initial Trust provided, inter alia, that upon the death of William F. Dart and his wife, the Initial Trust was to be divided into three separate trusts hereinbefore referred to as T-1, T-2 and T-3

(collectively the "Trusts"), for the benefit of the families of his three grandsons, Thomas Dart, Kenneth Dart, and Robert Dart, respectively.

35. An amendment to the Initial Trust dated October 30, 1975 ("Second Amendment") named Thomas Dart, Kenneth Dart, and Robert Dart as the co-trustees of their grandfather's trust. On March 26, 1976, literally days before William F. Dart died and at a time when he was gravely ill, the Initial Trust was amended again ("Third Amendment"). The Third Amendment was drafted by Benjamin O. Schwendener, Jr., who, in addition to his various corporate positions in the Dart family businesses, has served for decades as W.A. Dart's personal legal counsel and confidant. Schwendener drafted the Third Amendment not at the request of William F. Dart, but at the request of W.A. Dart. Defendant W.A. Dart was substituted as the trustee for each of the Trusts. William F. Dart signed this amendment while on his death bed, at the behest of W.A. Dart and Benjamin O. Schwendener, Jr., who falsely misrepresented to him that the principal purpose of this amendment was to save taxes, and did not tell him that the principal purpose was in fact to make W.A. Dart the Trustee. The change was not William F. Dart's idea, and was not drafted at his request, but instead was the product of W.A. Dart and Benjamin O. Schwendener, Jr.'s scheming and maneuvering. When he was confronted with the document by W.A. Dart and Benjamin O. Schwendener, Jr., William F. Dart was weak and dying. At the urging of W.A. Dart and Benjamin O. Schwendener, Jr., William F. Dart signed the Third Amendment and died very shortly thereafter on March 30, 1976.

36. The Trusts were initially funded by William F. Dart primarily with the minority interests in Dart family corporations.

The 1978 Reorganization

37. Two years after the death of his father, W.A. Dart decided in 1978 to reorganize the Dart Family businesses and formed Dart Management Company ("Dart Management").

Dart Management acquired all of Dart Container's outstanding stock and acted as the parent holding company for the Dart family business. Contemporaneously with this 1978 reorganization, W.A. Dart sold all of Dart Management's common stock to the Trusts, 10,000 shares to each, in exchange for $1,000,000 in notes from each trust. W.A. Dart was at the time the sole shareholder of the preferred stock of Dart Management, although it was anticipated that he would eventually distribute the Dart Management stock in equal shares to each of his three sons.

38. Dart Management was organized to vest 95 percent voting control in its voting preferred stock and 5 percent voting control in its common stock. Thus, after the organization of Dart Management, W.A. Dart held complete control of Dart Management by virtue of his ownership of its voting preferred stock and his position as trustee of the Trusts owning the common stock. Over subsequent years, W.A. Dart made gifts of small amounts of his preferred stock to various family members, including his wife, his three sons and their immediate families. However, W.A. Dart continued to retain complete control over Dart Management and all of the Dart family businesses.

39. The interests held by Dart Management primarily consisted of the plastic cup business (principally conducted by Dart Container) and an oil and gas business which initially operated as a subsidiary of Dart Container and ultimately became Dart Energy. The plastic cup business was and continues to be the larger and far more profitable segment of the Dart family businesses.

Events Leading to the 1986 Reorganization

40. From an early age, Thomas Dart struck out on his own, starting his own business as his grandfather (and mentor) had done. In 1975, at the age of 23, he started Dart Petroleum, the predecessor of Dart Energy. Dart Petroleum soon discovered oil fields containing over six million barrels of oil in the Michigan basin. After Dart Petroleum became Dart Energy, the company hit Michigan's first deep gas strike, which pro-

duced gas revenues of $1.1 million per month. Dart Energy now has nearly 200 producing wells in Michigan, according to the Michigan Geological Survey, and conducts operations around the world.

41. While Thomas Dart continued to work for the family in Dart Energy, his brothers, Kenneth Dart and Robert Dart, worked closely together at Dart Container with their father, W.A. Dart. These three defendants developed a strong personal and business relationship, and, together with defendants Benjamin O. Schwendener, Jr., Richard J. Rastall and, after he joined Schwendener's firm in the spring of 1985, Alan M. Valade, began to isolate Thomas Dart from Dart Container. During the early 1980's, serious differences and hostilities between Thomas Dart and these defendants arose regarding the operation and financial arrangements between the two companies.

42. Kenneth Dart had always resented the fact that Thomas Dart had started Dart's oil business and had enjoyed tremendous initial success and public accolade. He also fiercely competed with Thomas Dart, the eldest of the three sons. He did not want Thomas Dart to share in the prosperity of Dart Container in any way and began a methodical campaign designed to drive Thomas Dart and his family interests out of Dart Container for as grossly unfair and inadequate a price as possible. Kenneth Dart even kept extensive handwritten notes recording his intentions to eliminate Thomas Dart from having any interest in, and or involvement with, Dart Container. For example:

a. Kenneth Dart wrote in notes regarding consultations with Schwendener's associate Richard J. Rastall in 1984, "[t]he reason for wanting TJD Corp.[2] separated is to get TJD[3] progeny as far away as possible from DMC";[4]

b. He wrote that one of his "objectives" was "to eliminate TJD and other destabilizing influences on DCC";[5]

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2. "TJD Corp" was the parent company of Dart Energy prior to the Reorganization.

3. "TJD" referred to Thomas Dart.

4. "DMC" referred to Dart Management.

5. "DCC" referred to Dart Container.

c. Further, he wrote "I'll prevent TJD from having any control of assets in DMC or DCC"; and

d. He also wrote "My position will be that we get TJD out of DCC and simultaneously drop prices. We continue to maximize efficiency so that on occurrence of my being pres. [president] I will have the best chance of destroying competition. I'll prevent TJD from having any control of assets in DMC or DCC."

43. Kenneth Dart had ongoing discussions with defendants Robert Dart, W.A. Dart, Benjamin O. Schwendener, Jr., and Richard J. Rastall regarding his intentions and convinced them to join forces with him to eliminate Thomas Dart and Thomas Dart's family's ownership interest in Dart Container for as little as they thought they could get away with.

44. In early 1983, Thomas Dart entered a very difficult period in his life. His marriage came apart in a traumatic fashion. The world oil market had entered into its long downward slide, and there were disagreements within the Dart family as to how to handle it. By the end of that year, the family had hired a counsellor named Dr. Frank Ochberg (whose reputed expertise is in hostage psychology and victimization) to run a series of "family counselling" sessions that in fact focused upon Thomas Dart, and whether he would have any future role in the Dart family or its businesses. W.A. Dart was particularly intimidating toward his son Thomas, telling him, for example, "I'll tell you where to [defecate] and when to do it."

45. Because W.A. Dart as Trustee controlled all the major decisions of Dart Energy, he had complete financial control over Thomas Dart, Dart Energy's president. In fact, W.A. Dart has threatened and continues to threaten, both personally and through Schwendener, to fire Thomas Dart from his position with Dart Energy in order to coerce Thomas Dart's absolute obedience and to attempt to prevent him from pursuing judicial redress for the wrongs done to him by his father, his brothers, and others.

The 1986 Reorganization

46. In 1984, the possibility of another reorganization of the Dart companies was discussed among W.A. Dart and his

three sons. The discussions contemplated that T-2 and T-3 would receive Dart Container stock and T-1 would receive Dart Energy Stock and other value, ostensibly to equalize its post-reorganization value with the post-reorganization interests of T-2 and T-3. An investigation into the feasibility of such a prospective plan thereafter commenced.

47. As part of that investigation, W.A. Dart hired an appraisal firm, Valuation Research Corporation ("Valuation Research") to appraise the values of Dart Energy and Dart Container.

48. Knowing that a lower valuation of Dart Container would reduce the payments that Dart Container, T-2 and T-3 would be required to make to Dart Energy and T-1 under any reorganization plan, Kenneth Dart intentionally supplied Valuation Research with fraudulent financial data and sales projections for Dart Container in order to cause that company to be grossly undervalued. Kenneth Dart's actions were part of his and the other defendants' scheme to eliminate Thomas Dart and his family from Dart Container at a grossly unfair and undervalued price.

49. One of the methods used by Valuation Research to appraise Dart Container was the discounted cash flow method. W.A. Dart ordered Valuation Research to use a discount rate of 17 percent in calculating the value of Dart Container under this method even though he knew that that interest rate was not an accurate reflection of economic realities. W.A. Dart issued this directive with the sole intention that the value placed on Dart Container on the basis of this interest rate be false and that it understate Dart Container's value by hundreds of millions of dollars.

50. When Dart Energy employees reviewed the Valuation Research report in early 1986, they uncovered the fraudulent data and projections which were supplied by Kenneth Dart to Valuation Research. They also exposed Valuation Research's flawed conclusions which were largely based on the fraudulent data and projections.

51. W.A. Dart recognized that he could not rely on Valuation Research's appraisal because it lacked even a scintilla of

credibility. Therefore, in 1987, he hired a second appraisal firm, defendant, Standard Research Consultants ("SRC"), to perform new appraisals.

52. When Thomas Dart realized the magnitude of the flaws in the Valuation Research appraisal, he sought outside help in reviewing the appraisal process. In late February or early March of 1985, he approached William Blair & Co., the investment banking firm, and discussed with them the possibility of their assessing the valuation process on his behalf. Blair provided Thomas Dart with a draft retainer letter, dated March 4, 1985. However, W.A. Dart instructed Thomas Dart not to engage Blair or any other person to assist him in assessing the appraisal process. Because the only way Thomas Dart could pay such an advisor was out of the proceeds of T-1, and because W.A. Dart was then (and indeed remains) in sole control of the assets of T-1 and any distributions thereof, Thomas Dart's effort to retain financial counsel was frustrated by W.A. Dart's direction not to do so.

53. Thomas Dart also sought legal counsel to advise him on the 1986 reorganization. In the spring of 1986 he met with Kenneth Vaughan, an attorney in Chicago, to discuss the reorganization with him. Thomas Dart provided Vaughan with the few draft documents he had then been provided regarding the transaction.

54. In June, 1986, Thomas Dart met with W.A. Dart to discuss the reorganization. As W.A. Dart had done with Blair & Co., he again instructed Thomas Dart not to hire any outside advisors, including lawyers. W.A. Dart said "I'm not going to stand for other attorneys mucking up this transaction." W.A. Dart also specifically instructed Thomas Dart not to use any Dart Energy funds to pay for any legal counsel related to the reorganization, and impliedly threatened to fire Thomas Dart from his position with Dart Energy if Thomas Dart hired an attorney and paid him on his own. On June 26, 1986, W.A. Dart gave Thomas Dart a handwritten memorandum instructing Thomas Dart not to hire any attorney without agreement from W.A. Dart as to what the lawyer was to do.

55. Other individuals subsequently urged Thomas Dart to retain legal counsel to advise him about his interests. As a

result of these conversations, instructions and threats from his father, however, Thomas Dart was unable to do so and did not do so.

56. Proceeding without legal counsel or a financial advisor, Thomas Dart attempted to protect his own interests as best he could. However, when he raised certain issues with Benjamin O. Schwendener and Richard Rastall related to the structure of the reorganization, they responded by telling Thomas Dart that his participation on the reorganization was not necessary, and that if he did not participate the remaining family members would simply squeeze him out of Dart Container involuntarily. Third, Schwendener elaborated that Thomas Dart's "dad can liquidate the oil companies, fire you and see that you will never see a distribution out of that trust any time he chooses." As a result, Thomas Dart did not press the points he had intended to with Schwendener, Rastall, and the other defendants.

57. In December, 1986, the massive reorganization (the "Reorganization") of the Dart family businesses occurred, expressly subject to subsequent determination of values. The Reorganization was conceived and orchestrated by defendants W.A. Dart, Kenneth Dart and attorneys Benjamin O. Schwendener, Jr., Richard J. Rastall and Alan M. Valade, with the full participation of defendant Robert Dart, primarily for the purpose of forcing Thomas Dart and his family out of the principal family business, Dart Container, at a shockingly unfair and grossly inadequate price.

58. Late in the second week of December, 1986, Thomas Dart was instructed by W.A. Dart, Benjamin O. Schwendener, Jr., and Richard Rastall, to sign blank signature pages that would subsequently be attached to the various agreements reflecting the Reorganization. Subsequently, on or about December 23, 1986, Thomas Dart received a telephone call from his father, who summoned Thomas Dart to his father's office and instructed him to sign signature pages again. This time the signature pages were attached to the documents of which they purported to be a part, but at this signing session Thomas Dart was not afforded any opportunity to review those documents. Thomas Dart requested an executed copy of

these documents at the closing; W.A. Dart refused to provide one. In fact Thomas Dart did not receive an executed copy of the agreement until several months after the closing.

59. The essential terms of the Reorganization (contained in the "Reorganization Agreement") were that Dart Management was dissolved and T-1's indirect one-third interest in Dart Container (through its ownership of one-third of the common stock of Dart Management) was transferred to T-2 and T-3 in exchange for T-2 and T-3's indirect interest in Dart Energy. When the transaction was ultimately consummated, T-1 owned 100% of Dart Energy and T-2 and T-3 each owned 50% of Dart Container.

60. W.A. Dart did not disclose to Thomas Dart what consideration W.A. Dart would receive pursuant to the 1986 Reorganization.

61. In fact, as part of the Reorganization, W.A. Dart received stock in Dart Container of California and Dart Container of Northern California, cash and marketable securities in exchange for his stock in DTX, Inc. W.A. Dart, Benjamin O. Schwendener, Jr., Richard J. Rastall, and Alan Valade concealed this fact from Thomas Dart, who discovered it only in February, 1994.

62. At the time of the Reorganization, Dart Container was worth many times more than Dart Energy. By 1986, Dart Container was an extremely profitable enterprise experiencing exponential growth, while Dart Energy was insolvent in a depressed oil and gas industry where oil sold for $12 per barrel. All of the parties involved in the Reorganization recognized the existence of a huge disparity in value between the two companies, which is why an equalizing payment was required. The Reorganization provided that a payment was to be made from Dart Container to Dart Energy in an amount which, in theory, was supposed to equalize T-1's post- Reorganization value with the post-Reorganization values of T-2 and T-3.[6] Thus, an accurate appraisal of the fair market value of

6. In fact, W.A. Dart sought a private letter ruling from the Internal Revenue Service regarding the federal income tax consequences of the Reorganization. Among the representations in the letter ruling request

both Dart Container and Dart Energy was critical in (and, indeed, contractually required by the Reorganization for) determining the appropriate payment that needed to be made from the former to the latter. W.A. Dart had the ultimate responsibility to fairly determine these values.

63. Although the Reorganization "closed" in December 1986, the Reorganization expressly acknowledged that the amount of cash and other property to be transferred from Dart Container to Dart Energy would "not be known to the parties until valuations" were completed with respect to the companies. Under the terms of the Reorganization, Defendant W.A. Dart was responsible for determining the fair market value of Dart Container, Dart Energy, and the remaining properties then held by T-1, T-2 and T-3.

64. To carry out this responsibility W.A. Dart directed that Robert Gregory, then employed as a financial analyst by Dart Energy, solicit bids by various entities to perform this appraisal. At W.A. Dart's instruction, in May, 1986 Gregory mailed financial statements, organizational charts, tax sharing agreements, and business summaries to SRC and Morgan Stanley, two entities then being considered for this job. W.A. Dart ultimately selected SRC, purportedly because its bid for the work was less than Morgan Stanley's.

65. In August and September of 1986, Gregory spoke with W.A. Dart by telephone. To implement his and the other defendants' scheme to consummate the 1986 Reorganization while paying Thomas Dart and T-1 less than the fair value of the assets they were giving up, W.A. Dart directed during these conversations that all information and contact with SRC during the engagement was to go through him.

66. In October, 1986, as a further step to implement this scheme, Benjamin O. Schwendener, Jr., sent a letter to Idelle Howitte of SRC outlining the general premise of the proposed reorganization.

NOTES *(Continued)*

(which, on information and belief, was prepared by defendant Benjamin O. Schwendener, Jr.) was that the value of the assets given by T-1 was equivalent to the value of the assets received in return.

67. In February, 1987, Gregory spoke with W.A. Dart regarding various valuation methods and issues, both by telephone and in person. W.A. Dart said during one of these conversations that he believed the methods Gregory proposed did not apply. This statement was false: W.A. Dart knew that the valuation methods Gregory was discussing did apply, but rejected their use in the appraisal of Dart Container because he knew that they would produce an accurate assessment of that company's value. W.A. Dart's intention was to produce an inaccurate, and erroneously low, appraisal value.

68. Certain documents incorporated in the 1986 Reorganization as a "Schedule D" purported to update Dart Container's value from 1984 through 1986 by considering capital and interest effects over that period. In fact, the data in Schedule D as included in the closing documents for the 1986 Reorganization were false in that they reflected incorrect valuation numbers. W.A. Dart and Kenneth Dart knew that these numbers were false but insisted that they be included in the 1986 Reorganization closing documents because they understated the value of Dart Container, thereby advancing the defendants' scheme to pay an unfairly low price for the interest in Dart Container they were acquiring. W.A. Dart has since admitted that he had known for a lengthy period that at least $2 million was incorrectly deducted from the payments due Dart Energy through the adjustment of Schedule D. Despite this awareness, W.A. Dart has taken no steps to remedy this error.

69. In a March, 1987, telephone conversation with W.A. Dart, Gregory was instructed to send all data for SRC to W.A. Dart, who would then forward it to SRC. In fact, to advance their scheme, W.A. Dart and Kenneth Dart furnished all data used by SRC in its appraisal.

70. In July of 1988, SRC issued a draft of its report, which it sent by United States mail to Gregory and W.A. Dart.

71. In October and November of 1988, Gregory had several telephone calls with William Pittock of SRC concerning valuation issues and approaches.

72. In November, 1988, Pittock called Gregory. Pittock said that some of the same statistical tests and ratios recom-

mended by Gregory for use in the appraisal (*i.e.*, linear regression and others) were in fact used by SRC in its internal workpapers. During this conversation, Gregory asked how, if SRC used the statistical approach Gregory recommended, SRC could have such a low value based on the data in the report. Pittock answered that SRC did determine much higher values based on the use of similar statistics, even higher than those reached by Gregory based on tests conducted in their internal workpapers. Pittock stated that "every time we concluded a value higher based on the data, W.A. would say that it was too high and to lower it way down."

73. In notes Pittock made at the time he stated his understanding that the goal of the Reorganization was that each of the three trusts — T-1, T-2, and T-3 — walk away from the transaction with one-third of the wealth shared among them before the transaction. But Pittock's notes state his belief that under the Reorganization as executed, "Tom does not walk away with ⅓" (emphasis in original).

74. On November 8, 1990, W.A. Dart requested that Gregory send him copies of Gregory's SRC correspondence files, including memoranda. Gregory did so.

75. On June 3, 1991, W.A. Dart called Gregory. During this conversation, Gregory told W.A. Dart he believed the value SRC assigned to Dart Container was too low considering the data and that Pittock felt under pressure to keep the value low. W.A. Dart said that he had not influenced SRC. W.A. Dart knew this statement was false when he made it. He made the statement to conceal and advance his and the other defendants' scheme to obtain control over Dart Container at a price less than the fair value of these assets.

76. From 1987 through late 1991, the amount of money to be paid to Dart Energy by Dart Container in connection with the Reorganization was the subject of a series of protracted negotiations. SRC did not complete its appraisal until June 1989. In the interim, Kenneth Dart actively and routinely urged W.A. Dart to ensure that the valuation of Dart Container was as low as possible. W.A. Dart, in turn, demanded that SRC knowingly use false information to arrive at an artificially low appraised value for Dart Container in order to

reduce the payments Dart Container would owe to Dart Energy under the Reorganization. As a direct result of this pressure, SRC in its report, undervalued Dart Container by hundreds of millions of dollars. W.A. Dart adopted the valuation figure reached by SRC and represented to Thomas Dart and others that it was fair, even though he knew that the valuation was not a fair statement of the value of Dart Container and that it understated the value of that company by hundreds of millions of dollars.

77. Negotiations between Thomas Dart and W.A. Dart regarding the SRC appraisal continued for several years after SRC issued its "final report" in 1989. In apparent recognition of the fact that the SRC appraisal substantially undervalued Dart Container, W.A. Dart eventually told Thomas Dart and his representatives that he was considering adjusting SRC's valuation figures to reflect the "proper value" of Dart Container. Had he actually and fairly done so, this would have resulted in hundreds of millions of dollars being paid to Dart Energy. However, in late 1991, negotiations ended, and W.A. Dart, apparently deciding to rely upon the disputed values arrived at by SRC, finally determined the grossly inadequate "equalization" value Dart Energy was to receive. Despite his full awareness that SRC's appraised value of Dart Container was grossly erroneous and that his fiduciary obligations mandated rejection of SRC's valuation, he refused to make any corrective adjustments.

78. As a representative example of the fraud (more fully described below) perpetrated on the plaintiffs, the value of T-1's indirect interest in Dart Container (through its ownership of Dart Management stock) just prior to the 1986 Reorganization was in excess of $330 million. The value of equalizing assets thus far conveyed pursuant to the Reorganization to T-1, through Dart Energy, has been less than $60 million, leaving a balance owed to it of over a quarter of a billion dollars plus an investment return that accurately reflects the time value of money.

79. On July 11, 1990, W.A. Dart called Thomas Dart and asked that the latter appear in the former's office to sign docu-

ments related to a legal proceeding then ongoing between Dart Container and California state tax authorities.

80. When Thomas Dart arrived, accompanied by his son, to sign these documents, W.A. Dart handed him a group of documents and instructed him to sign in a series of places. He again represented that all of the documents related to the California tax proceeding to which Dart Container was then a party.

81. As Thomas Dart reviewed the documents he discovered that one of them was not related to the California tax proceeding, but was in fact a release by him, Dart Energy, and any other entity with any potential claim, of all claims arising out of or relating to the 1986 Reorganization. When he realized this he refused to sign the document, took a copy of it, and left his father's office with the document.

82. On July 19, 1991, W.A. Dart handed Thomas Dart a memorandum in which he stated, among other things:

> The suggestion that Standard Research was unduly influenced by me is totally unfounded and untrue. Such a suggestion has to presuppose that my attitude towards the beneficiaries of the three trusts is biased. This is also unfounded and untrue.

W.A. Dart knew that both of these statements were false when he made them. He knew that he had influenced SRC "unduly" and improperly by demanding and compelling SRC to issue an appraisal of Dart Container that was grossly inaccurate. He knew further that his attitude and conduct towards the beneficiaries of the three trusts were grossly different, and that his intention throughout the development and execution of the Reorganization was precisely to enable T-2 and T-3, and their beneficiaries, to profit at the expense of T-1 and its beneficiaries.

83. Moreover, despite the fact that the Trust expressly required that any division of trust assets be made by the trustee "at current values," the appraisal date utilized for the December 1986 Reorganization was March 31, 1984, almost three years prior to the Reorganization closing date, and was therefore entirely unrepresentative of the true value of Dart

Container at the time of the Reorganization. In fact, the true value of Dart Container was substantially higher by December, 1986.

W.A. Dart Dominates Dart Energy's Board and Breaches His Fiduciary Duties

84. W.A. Dart had been a member of the Board of Directors of Dart Energy since before the Reorganization in 1986. In addition, as Trustee of T-1, W.A. Dart has the power to vote all of the shares of Dart Energy. He has used this power to elect William L. Myers and JoAnne Williams, two employees of Dart Container, to the four-person Dart Energy board of directors ("Dart Energy Board"). W.A. Dart thus exercises effective control over the Dart Energy Board.

85. W.A. Dart has used his control over T-1 and the Dart Energy Board to block Dart Energy and T-1 from pursuing valid claims to recover the money they are owed as a result of the improper valuation and fraudulent presentation of financial information in Schedule D.

86. In purporting to fulfill his responsibility to fairly value the two companies, W.A. Dart breached his fiduciary duties to T-1, Dart Energy, Thomas Dart and Judith Dart by overtly and unfairly favoring Dart Container, T-2, T-3, Kenneth Dart and Robert Dart to the substantial detriment of the plaintiffs, T-1 and Dart Energy.

Derivative Allegations

87. Plaintiffs Thomas Dart and Judith Dart bring certain claims in this action derivatively in the right of and for the benefit of Dart Energy, pursuant to Federal Rule of Civil Procedure 23.1, to redress injuries suffered by Dart Energy as a result of the racketeering activity of defendants W.A. Dart, Ken Dart, Robert Dart, Benjamin O. Schwendener, Jr., and Richard Rastall as well as the conspiracy to commit such offenses by the other defendants. Dart Energy is named as a nominal defendant herein solely in a derivative capacity. This is not a collusive action to confer jurisdiction on this Court it would not otherwise have.

88. As beneficiaries of T-1, the sole shareholder of Dart Energy, plaintiffs will adequately and fairly represent the interests of Dart Energy and its shareholders in enforcing and prosecuting their rights. This action was brought to remedy violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968, and to establish the liability of defendant W.A. Dart for breaching his duties as a director of Dart Energy.

89. In an effort to protect Dart Energy's right to receive its fair share of Reorganization proceeds from Dart Container, plaintiff Thomas Dart attempted to persuade the other three directors on the Dart Energy Board (including W.A. Dart) to assert the company's rights to these proceeds. For example:

a. On February 3, 1993 Thomas Dart made a written demand on the Dart Energy Board that they pursue claims on behalf of Dart Energy. Thomas Dart informed the three other board members, W.A. Dart, William L. Myers and JoAnne Williams, at a special board meeting on February 25, 1993, specifically what the nature of these claims was. The board rejected Thomas Dart's demand and thereafter passed a resolution ostensibly preventing him (in his capacity as a director and president of Dart Energy) from pursuing the types of Dart Energy claims set forth in this Complaint;

b. The Board's resolution also stated that, upon review of a memorandum from attorney Michael Eizelman, it would consider whether to prosecute Dart Energy's claims. The Board received Eizelman's memorandum on March 22, 1993, and has never made any effort to investigate any of Dart Energy's claims right up to the date of this Complaint;

c. W.A. Dart wields absolute control over the Dart Energy Board. For example, W.A. Dart, as trustee of T-1 and, as such, Dart Energy's de facto sole stockholder, hand picked and elected William L. Myers and JoAnne Williams to the Dart Energy Board. Myers and Williams are employees of defendant Dart Container, which is owned and firmly controlled by W.A. Dart, Kenneth Dart and Robert Dart. Myers and Williams are controlled by

and completely beholden to W.A Dart and have absolutely no independent authority to act in behalf of Dart Energy's interests. They have always voted in step with W.A. Dart; and

d. W.A. Dart, Myers and Williams have obvious conflicts of interest which fatally taint their decision not to prosecute the Dart Energy claims alleged in this Complaint.

90. Knowing that the Dart Energy Board passed a resolution forbidding the president from pursuing the types of claims set forth in this Complaint, and that the Board failed even to investigate these claim, any further demand plaintiffs would make on the Dart Energy Board would undoubtedly be futile.

91. Moreover, any investigation which might now be undertaken by the Dart Energy Board will not be independently conducted because:

a. With the exception of plaintiff Thomas Dart, the entire current Dart Energy Board participated in the wrongs described herein;

b. The acts described herein constitute violations of state law and the fiduciary duties owed by the Dart Energy Board and these acts are incapable of ratification;

c. The known principal wrongdoer, W.A. Dart, is in a position to, and does in fact, dominate and control the Dart Energy Board. Thus, the Board could neither exercise independent objective judgment in deciding whether to bring this action nor vigorously prosecute this action;

d. Due to the illegal conduct described herein, Dart Energy has suffered substantial monetary damages, yet the Dart Energy Board has refused to pursue legal action against those of the defendants responsible for the wrongful actions described herein and, in fact, to the contrary, and as described above, the Board has responded to multiple and specific delineations of wrongful conduct as presented by plaintiff Thomas Dart by refusing to take any action;

e. The Dart Energy Board cannot be relied upon to reach a truly independent decision as to whether to commence the demanded actions against themselves and for

the misconduct alleged in this Complaint, in that, inter alia, the Board of Directors is totally dominated by defendant W.A. Dart, who was personally and directly involved in the misconduct alleged, and to whose directives and views the Board has consistently acceded and will continue to accede. This domination of the Dart Energy Board by defendant W.A. Dart has impaired the Board's ability to validly exercise its business judgment and rendered it incapable of reaching an independent decision as to whether to accept plaintiffs' demand;

f. In order to bring the action set forth in this Complaint, the members of Dart Energy Board would be required to sue themselves and/or their fellow directors and allies in the top ranks of the company with whom they have entangling financial alliances, interest, and dependencies, which they would not do. They therefore would not be able to vigorously prosecute any such action; and

g. The members of the Dart Energy Board have engaged in such conduct to preserve their positions of control and the perquisites thereof and are incapable of exercising independent objective judgment in deciding whether to bring this action. The Board members also have close personal and business ties with each other and are, consequently, interested parties and cannot in good faith exercise independent business judgment to determine whether to bring this action against themselves.

92. Plaintiffs Thomas Dart and Judith Dart, in their own capacity and as beneficiaries of T-1 and beneficial owners of Dart Energy, and T-1 and Dart Energy (derivatively through plaintiffs Thomas Dart and Judith Dart) file this action to recover the damages caused by defendants' racketeering activities.

93. W.A. Dart made false statements of material fact and/or opinion fraudulently misrepresenting to Thomas Dart that he would act fairly and independently; that he would ensure that an accurate and impartial appraisal of the Dart

companies would occur; and that the appraisal produced of the Dart companies was in fact fair when W.A. Dart knew that it was not fair.

94. These misrepresentations were made on numerous occasions beginning in 1984 through the closing date of the Reorganization on December 29, 1986. In fact, W.A. Dart continued to make such fraudulent misrepresentations through late 1991. He continued to conceal evidence of such statements, and/or their falsity, until at least February of 1994.

95. W.A. Dart knew when he made these misrepresentations that they were false and that, in fact, he would not act independently and instead would strongly favor the interests of Dart Container, T-2 and T-3 (and therefore the interests of Kenneth Dart and Robert Dart) over the interests of Dart Energy and T-1 (and therefore the interests of Thomas and Judith Dart), which facts he failed to disclose to Thomas Dart.

96. W.A. Dart made these deceptive misrepresentations to Thomas Dart, and failed to disclose material facts to him, for the express purposes of inducing Thomas Dart to execute the Reorganization Agreement; of completing the Reorganization, and placing full ownership of Dart Container in his own hands and the hands of Kenneth and Robert Dart for as small a payment to T-1 as possible; and of preventing Thomas Dart from discovering the falsity of the statements made to effect these goals.

97. Until he began to discover the fraud in 1991, Thomas Dart reasonably relied on the fraudulent misrepresentations of W.A. Dart that, as the trustee of T-1 and as a director of Dart Energy, he would not breach his fiduciary duties of care and loyalty owed to T-1 and Dart Energy. It was also reasonable for Thomas Dart to rely on the representations made by W.A. Dart given the familial and fiduciary relationship between the two men.

98. Contrary to the fraudulent misrepresentations made by W.A. Dart, Dart Container was intentionally undervalued by hundreds of millions of dollars, which had the effect of grossly reducing the money Dart Container paid to Dart Energy and T-1 pursuant to the Reorganization.

99. From 1989 through late 1991, defendant W.A. Dart continued to perpetrate this fraud by pretending to negotiate in good faith with Thomas Dart and by representing that he would correct any errors that existed in the appraisal by SRC. In fact, W.A. Dart never had any intention of correcting the grossly unfair appraisal despite his obligations to do so as a fiduciary of the plaintiffs.

100. In addition, W.A. Dart made fraudulent misrepresentations to Thomas Dart that the value determined by the appraisal firm hired to conduct the valuation would be fair. In fact, W.A. Dart actively pressured SRC to keep the Dart Container appraisal artificially low, and he knew that the figure SRC arrived at was false and was not a fair statement of the value of Dart Container.

101. Defendant W.A. Dart knew when he made these representations that they were false.

102. Plaintiff Thomas Dart reasonably relied on the representations by W.A. Dart.

103. Contrary to the fraudulent misrepresentations made by W.A. Dart, Dart Container was intentionally undervalued by hundreds of millions of dollars, which grossly reduced the amount Dart Container paid to T-1 and Dart Energy pursuant to the plan of Reorganization.

104. As beneficiaries of T-1, Plaintiffs Thomas J. Dart and Judith L. Dart have an expectancy interest in the value of T-1.

105. Because T-1 became the sole shareholder of Dart Energy following the Reorganization, the value of T-1 was directly dependent on the fairness of the equalizing payment to be made by Dart Container to Dart Energy. Thus, the fairness of the equalizing payment depended upon an accurate appraisal of the fair market value of both Dart Container and Dart Energy.

106. Plaintiffs Thomas Dart and Judith Dart, by virtue of their beneficial interest in T-1, the owner of Dart Energy stock, are entitled to state a derivative claim, pursuant to Fed. R. Civ. P. 23.1 on behalf of Dart Energy and against W.A. Dart.

107. As set forth in paragraph 89 above, Thomas Dart undertook efforts to cause the Dart Energy Board to pursue

claims on behalf of Dart Energy arising out of the improper valuation of Dart Energy and Dart Container and the resulting Reorganization based on such valuation.

108. Despite Thomas Dart's efforts, W.A. Dart, as a director of Dart Energy and the de facto head of that company by virtue of his domination of two other directors (and resulting control of the Board), as well as his status as a fiduciary of the sole stockholder, T-1, refused to prosecute or even legitimately investigate the claims of Dart Energy in violation of his statutory obligation as a director.

109. Defendants W.A. Dart, Kenneth Dart, Robert Dart, Benjamin O. Schwendener, Jr., Richard J. Rastall, Alan M. Valade, SRC and Dart Container wrongfully, wantonly and maliciously conspired to deprive plaintiffs, T-1 and Dart Energy, of their property interests, as more fully described in this Complaint.

W.A. DART'S FRAUDULENT SIGNATURE OF A PROMISSORY NOTE

110. To prevent Thomas Dart from being able to pay attorneys to investigate and prosecute the claims set forth herein as well as other claims, W.A. Dart attempted to avoid a debt owed to Thomas Dart by T-1 by forging a backdated promissory note.

111. In 1978, Thomas Dart lent approximately $368,000 to T-1. In conformity with then-applicable tax regulations, it was agreed by Thomas Dart and W.A. Dart that this loan would accrue interest at the prime rate then in effect, which was 8%. The loan was callable on Thomas Dart's demand.

112. In early December, 1992, Thomas Dart made oral demand of W.A. Dart, as trustee of T-1, for immediate repayment of this note. W.A. Dart refused to acknowledge any debt and said that the statute of limitations barred any such demand for recovery.

113. In January, 1993, W.A. Dart caused to be deposited in the United States mail a letter, addressed to and received by Thomas Dart, stating that, in full satisfaction of this obligation, he was enclosing a check in an amount stated to be

$438,000 in principal plus interest at 6% from the date of Thomas Dart's demand for repayment.

114. Also included with this letter was a document purporting to be a promissory note acknowledging a debt to Thomas Dart from T- 1 with a principal amount of $438,000 at 0% interest until demand and 6% interest thereafter. The document was signed by W.A. Dart and purported to have been executed in 1978.

115. This document is a fraud. No such debt was ever agreed upon by Thomas Dart and T-1.

STATUTE OF LIMITATIONS

116. This action is brought within the applicable statutory limitations period, as tolled by defendants' fraudulent concealment and the doctrine of equitable tolling.

Fraudulent Concealment

117. Through the joint efforts of W.A. Dart, Benjamin O. Schwendener, Jr., and the remaining individual defendants, the fraud alleged herein was concealed until at least February of 1994 in that, as alleged herein, inter alia:

a. W.A. Dart, Schwendener and others actively sought to prevent, and did for several years prevent, Thomas Dart from obtaining any legal counsel, or appraisal or accounting advice, to assist him in investigating the development and execution of the Reorganization;

b. W.A. Dart and Benjamin O. Schwendener, Jr., actively sought to prevent, and did prevent, Thomas Dart from learning what the terms of the 1986 Reorganization actually were until at least the spring of 1987 by, among other things, denying him access to the Reorganization Agreement and by demanding that he sign signature pages unattached to the documents of which they purported to be a part (and to which they were subsequently attached);

c. W.A. Dart has consistently refused to authorize engagement of counsel, and payment of legal fees out of T-1 or Dart Energy. W.A. Dart attempted to prevent the

institution and/or prosecution of any legal action by which the matters alleged herein could be remedied;

d. W.A. Dart continued, falsely, to deny that he had pressured SRC to issue an inaccurate appraisal of Dart Container until at least July 19, 1991;

e. Until February, 1994, W.A. Dart concealed the fact that he had participated directly in the 1986 Reorganization and that as part of that transaction he had sold certain securities in exchange for other securities and cash;

f. W.A. Dart had attempted, by trickery and threats, to induce Thomas Dart to waive all claims he and T-1 have arising out of the development and execution of the 1986 Reorganization;

g. Until May, 1994, W.A. Dart refused to provide Thomas Dart with any meaningful access to any financial information regarding the status or management of T-1 or its assets.

EQUITABLE TOLLING

118. By virtue of their status as fiduciaries of T-1, and by virtue of their control of transactions in which they were interested parties, W.A. Dart and Claire Dart had a duty to provide complete disclosure to Thomas Dart, Dart Energy, T-1, and the remaining beneficiaries of T-1 regarding all material facts; they had a duty to ensure that Thomas Dart, Dart Energy, T-1, and the remaining beneficiaries of T-1 participated in these transactions with an accurate understanding of the transactions' impact upon them, including the many legal ramifications; and they had a duty to identify their own conflicts of interest and to urge Thomas Dart, Dart Energy, T-1, and the remaining beneficiaries of T-1 to seek counsel to assess those conflicts. Instead, W.A. Dart did exactly the opposite, threatening to exercise his discretion as trustee of T-1 to injure the financial prospects of Thomas Dart and/or Dart Energy if any of those persons or entities attempted to participate in the transactions knowledgeably or to ensure that their interests were being adequately protected in those transactions. W.A. Dart thereby prevented Thomas Dart from investigating and prosecuting these claims.

119. By so grossly breaching their fiduciary duties to Thomas Dart, Dart Energy, T-1, and the remaining beneficiaries of T-1, W.A. Dart and Claire Dart equitably tolled the statute of limitations until such time as the parties injured by defendants' conduct could find counsel capable of assessing that conduct and willing to represent plaintiffs in a legal challenge to that conduct on terms feasible to the plaintiffs, who are unable to pay attorneys' fees out of their pocket.

COUNT I

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT 18 U.S.C. §1962(b)

120. Paragraphs 1 through 119 are incorporated herein by reference.

121. Each of the defendants conspired and agreed with the remaining defendants to effectuate the scheme to defraud outlined above, in violation of 18 U.S.C. § 1962(b).

Mailings

122. Having previously devised the scheme described above to defraud plaintiffs and to obtain money and property from them by means of false and fraudulent pretenses and representations, the following defendants deposited or caused to be deposited the following items in the United States mail on the dates indicated, and addressed as indicated, for the purpose of executing that scheme:

a.	DATE:	May, 1986
	RECIPIENTS:	Morgan Stanley SRC
	RESPONSIBLE DEFENDANT:	W.A. DART
	SENDER:	Robert Gregory, at W.A. Dart's instruction

	CONTENTS:	Dart Container financial statements, organizational charts, tax sharing agreement, and business summaries
	RELATIONSHIP TO SCHEME:	Defendants intended to, and did in fact, retain an independent entity to perform an appraisal so that the value settled upon would appear objective and fair. But defendants intended to, and did in fact, manipulate the supply of information to the company selected so that the appraisal value in fact would not be fair. The first step in this scheme was, necessarily, to arrange for the appointment of an unrelated entity to perform the appraisal.
b.	DATE:	October, 1986
	RESPONSIBLE DEFENDANT:	Benjamin O. Schwendener, Jr.
	SENDER:	Benjamin O. Schwendener, Jr.
	RECIPIENTS:	Idelle Hawitt, SRC
	CONTENTS:	Letter outlining general premises of the proposed reorganization
	RELATIONSHIP TO SCHEME:	To facilitate SRC's appraisal
c.	DATE:	July, 1988
	RESPONSIBLE DEFENDANT:	W.A. Dart, Kenneth Dart, Robert Dart, Benjamin O. Schwendener, Jr., Richard J. Rastall, Alan Valade
	SENDER:	SRC
	RECIPIENTS:	W.A. Dart, Robert Gregory

	CONTENTS:	Draft SRC appraisal
	RELATIONSHIP TO SCHEME:	An essential part of the scheme was that SRC produce an appraisal that appeared to be based on input from all affected parties and on consideration of all information supplied. To effectuate this goal it was necessary for SRC to allow Gregory as well as W.A. Dart to see a draft of SRC's work product and to comment thereupon.
d.	DATE:	January, 1993
	RECIPIENT:	Thomas Dart
	RESPONSIBLE DEFENDANT:	W.A. Dart
	SENDER:	W.A. Dart
	CONTENTS:	Fraudulent "promissory note" dated 1978
	RELATIONSHIP TO SCHEME:	W.A. Dart refused to cause T-1 to pay back funds it had borrowed from Thomas Dart in order to prevent Thomas Dart from being able to pay attorneys to investigate and prosecute the claims at issue in this Complaint and other claims. The fraudulent promissory note was an effort to substantiate W.A. Dart's fraudulent claim that the loan had never been made on its true terms.

Each such mailing was a separate act of mail fraud in violation of 18 U.S.C. § 1341. Each was also a separate act of racketeering activity within the meaning of 18 U.S.C. § 1961.

Wire Communications

123. Having previously devised the scheme described above to defraud plaintiffs and to obtain money and property from them by means of false and fraudulent pretenses and representations, the following defendant transmitted or caused to be transmitted information by wire in interstate commerce on the dates indicated, and to the persons indicated, for the purpose of executing that scheme:

a.	DATE:	August and September, 1986
	RESPONSIBLE DEFENDANT:	W.A. Dart
	PARTICIPANTS IN CALL:	W.A. Dart, Robert Gregory
	SUBSTANCE OF COMMUNICATION:	W.A. Dart directed Gregory that all information and contact with SRC during the appraisal should be exclusively through W.A. Dart.
	RELATIONSHIP TO SCHEME:	This directive enabled W.A. Dart to control the flow of information to SRC, and also enabled him to speak in confidence to SRC when he ordered SRC to produce an inaccurately low appraisal of Dart Container.
b.	DATE:	February, 1987
	RESPONSIBLE DEFENDANT:	W.A. Dart
	PARTICIPANTS IN CALL:	W.A. Dart, Robert Gregory
	SUBSTANCE OF COMMUNICATION:	This telephone conversation concerned appraisal methods to be used by SRC.

	RELATIONSHIP TO SCHEME:	W.A. Dart spoke by telephone with Robert Gregory regarding the SRC valuation in order to advance his and the remaining defendants' goal of ensuring that SRC issued an appraisal that appeared to be objective and exhaustive but that in fact set a fraudulently low value on Dart Container.
c.	DATE:	March, 1987
	RESPONSIBLE DEFENDANT:	W.A. Dart
	PARTICIPANTS IN CALL:	W.A. Dart, Robert Gregory
	SUBSTANCE OF COMMUNICATION:	W.A. Dart instructed Gregory that all data to be supplied to SRC should be sent by Gregory to W.A. Dart, who would then forward it to SRC.
	RELATIONSHIP TO SCHEME:	This directive enabled W.A. Dart to control the flow of information to SRC, and also enabled him to speak in confidence to SRC when he ordered SRC to produce an inaccurately low appraisal of Dart Container.
d.	DATE:	June 3, 1991
	RESPONSIBLE DEFENDANT:	W.A. Dart
	PARTICIPANTS IN CALL:	W.A. Dart, Robert Gregory

SUBSTANCE OF COMMUNICATION:	This telephone conversation, which was initiated by W.A. Dart, concerned valuation methods and the SRC report. Gregory stated his belief that SRC had been ordered to produce an inaccurately low valuation of Dart Container. W.A. Dart falsely stated that neither he nor any other person had influenced SRC in its valuation.
RELATIONSHIP TO SCHEME:	W.A. Dart made this statement to conceal and advance his and the remaining defendants' scheme to obtain control over Dart Container at a price less than the fair value of these assets.

Each such communication was a separate act of wire fraud in violation of 18 U.S.C. § 1343. Each was also a separate act of racketeering activity within the meaning of 18 U.S.C. § 1961.

124. The acts by each of these defendants were all related to one another in that they shared a common goal, a common method, and a common set of victims, all of which had been jointly agreed upon by the defendants: the removal of Thomas Dart from participation in Dart Container at the lowest possible cost to T-2, T-3, Kenneth Dart, Robert Dart, Claire Dart, and W.A. Dart, through misrepresentation of the value of the assets taken from T-1. The lower the cost to these persons and entities, the greater the injury to T-1, Dart Energy, Thomas Dart, and all other beneficiaries of T-1. Each of the communications identified in paragraphs 122 and 123 advanced this goal in the method indicated.

125. These acts satisfy the continuity requirement imposed by the Racketeer Influenced and Corrupt Organizations Act in that they each shared and together advanced a common goal, a common method, a common set of victims, and in that they continued over a period of at least eight years, from 1986 through the present.

126. The mailings and wire communications were in furtherance of the scheme in that each either facilitated defendants' goal of causing SRC to produce an inaccurately low appraisal of SRC, concealed the defendants' awareness of the inaccuracy of the valuation thus produced, or both.

The Enterprise

127. Dart Container Corporation is an enterprise engaged in interstate and foreign commerce.

128. The purpose and effect of defendants' scheme was to obtain and maintain control over Dart Container Corporation. Defendants achieved this goal through the pattern of racketeering activity alleged in paragraphs 120 through 126 above, in violation of 18 U.S.C. § 1962(b).

129. Defendants bear the following relationship to the enterprise:

NAME	RELATIONSHIP
W.A. Dart	Chairman of the Board
Kenneth Dart	Officer and director
Robert Dart	Officer and director
Claire Dart	50% shareholder
Benjamin O. Schwendener, Jr.	Director, Vice President and Counsel
Richard J. Rastall	Counsel
Alan Valade	Counsel

130. The affairs of the enterprise affect interstate and foreign commerce in that Dart Container maintains operations in at least twelve states, and around the world, and has annual revenues in excess of $900 million.

COUNT II

Racketeer Influenced and Corrupt Organizations Act
18 U.S.C. §1962(c)

131. Paragraphs 1 through 130 are incorporated herein by reference.

132. An association in fact existed among defendants W.A. Dart, Kenneth Dart, Robert Dart, Claire Dart, Ben-

jamin O. Schwendener, Jr., Richard J. Rastall, and Alan Valade, which constitutes an enterprise for purposes of 18 U.S.C. § 1962(c).

133. The shared purpose of this association in fact was the removal of Thomas Dart from participation in Dart Container at the lowest possible cost to T-2, T-3, Kenneth Dart, Robert Dart, Claire Dart and W.A. Dart, through misrepresentation of the value of the assets taken from T-1. The lower the cost to these persons and entities, the greater the injury to T-1, Dart Energy, Thomas Dart, and all other beneficiaries of T-1. Each of the communications identified in paragraphs 122 and 123 advanced this goal in the method there indicated and as more fully alleged in paragraph 124 above.

134. The structure of this association in fact remained the same from the time of its creation — when the goals identified in paragraph 124 were agreed upon — through to the present. The most active participants in the association in fact, and those principally responsible for carrying out its goals, were and are W.A. Dart and Kenneth Dart.

135. Each of the defendants identified in paragraph 132 participated in the conduct of this association in fact through a pattern of racketeering activity, as set forth in paragraphs 122 and 123 above.

136. The association in fact affected interstate commerce in that its purpose and effect was to obtain control over Dart Container Corporation, which is an entity engaged in interstate commerce. The association in fact also affected interstate commerce by using the mails and interstate wire communications to effectuate its goal.

137. Plaintiffs Thomas Dart and Judith Dart were injured by the association in fact in that the trust of which they are beneficiaries suffered a loss of hundreds of millions of dollars as a result of defendants' successful effectuation of their scheme.

138. Plaintiff Dart Energy was injured by the association in fact in that, under the 1986 Reorganization Agreement, payments were supposed to be made to Dart Energy sufficient to equalize the value of that company and the value of one-third of Dart Container. As a result of defendants' scheme,

effectuated through the association in fact alleged herein, these payments were hundreds of millions of dollars less than they should have been.

RELIEF REQUESTED

WHEREFORE, plaintiffs demand judgment against defendants, jointly and severally, on behalf of themselves as follows:

a. For actual damages incurred as a result of the defendants' fraudulent scheme alleged herein, trebled pursuant to 18 U.S.C. § 1965(c);

b. For reasonable attorney's fees, accountant's fees, investigators' fees, consultant's fees and other reasonable expenses together with applicable interest and the costs and disbursements of this action; and

c. Such other and further relief as the Court may seem just and proper.

JURY TRIAL DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

BERGER & MONTAGUE, P.C.

BY:_____
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Jerome M. Marcus
Bart D. Cohen

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Attorneys for Plaintiffs

July 7, 1994

SCHEDULE OF INTERESTED PARTIES

NAME	AGE	RELATIONSHIP	ADDRESS
William A. Dart	Adult	Son of William F. Dart; father of Thomas J., Robert C. and Kenneth B. Dart; and former Trustee	Represented by: BARRIS, SOTT, DENN & DRIKER Eugene Driker, Stephen E. Glazek, and Morley Witus 211 W. Fort Street, 15th Fl. Detroit, MI 48226
Claire T. Dart	Adult	Wife of William A. Dart; mother of Thomas J., Robert C. and Kenneth B. Dart; and former Trustee	Represented by: BARRIS, SOTT, DENN & DRIKER
Thomas J. Dart	Adult	Petitioner; husband of petitioner Judith L. Dart; grandson of William F. Dart; son of William A. and Claire T. Dart; and a beneficiary of the Thomas J. Dart Residual Trust (T-1)	Represented by: FRASER TREBILCOCK DAVIS & FOSTER, P.C. Everett R. Zack and Michael E. Cavanaugh 1000 Michigan National Tower Lansing, MI 48933 CRAVATH, SWAINE & MOORE David Boies and John Kuster Worldwide Plaza 825 Eighth Avenue New York, NY 10019 BODMAN, LONGLEY & DAHLING Theodore Souris and Charles N. Raimi 100 Renaissance Center 34th Floor Detroit, MI 48243
Judith L. Dart	Adult	Petitioner; wife of petitioner Thomas J. Dart; beneficiary of T-1	Represented by: FRASER TREBILCOCK DAVIS & FOSTER, P.C. CRAVATH, SWAINE & MOORE BODMAN, LONGLEY & DAHLING

NAME	AGE	RELATIONSHIP	ADDRESS
Thomas J. Dart, Jr., Justin M. Dart and Alexis A. Dart	Minors	Great-grandchildren of William F. Dart; grandchildren of William A. and Claire T. Dart; children of Thomas J. Dart and Michelle Reynolds; and beneficiaries of T-1	c/o Gladys Barsamian Guardian ad Litem Represented by: BEIER HOWLETT, P.C. James R. Howlett 200 E. Long Lake Rd. Suite 110 Bloomfield Hills, MI 48304
Kenneth B. Dart	Adult	Grandson of William F. Dart; son of William A. and Claire T. Dart; and a beneficiary of the Kenneth B. Dart Residual Trust (T-2) and the Kenneth B. Dart Residual Subtrust	Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C. Webb A. Smith, Lawrence B. Lindemer, and Allan Claypool 313 South Washington Square Lansing, MI 48933
Janice M. Dart	Adult	Wife of Kenneth B. Dart; a beneficiary of the Kenneth B. Dart Residual Subtrust	Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C.
Kelly M. Dart, Corina L. Dart and Kristin J. Dart	Minors	Great-grandchildren of William F. Dart; grandchildren of William A. and Claire T. Dart; children of Kenneth B. and Janice M. Dart; and beneficiaries of the Kenneth B. Dart Residual Subtrust	c/o Kenneth B. Dart Guardian ad Litem Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C.

NAME	AGE	RELATIONSHIP	ADDRESS
Robert C. Dart	Adult	Grandson of William F. Dart; son of William A. and Claire T. Dart; and a beneficiary of the Robert C. Dart Residual Trust (T-3) and the Robert C. Dart Residual Subtrust	Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C.
Katina E. Dart	Adult	Wife of Robert C. Dart; and a beneficiary of the Robert C. Dart Residual Subtrust	Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C.
William R. Dart and Arianna C. Dart	Minors	Great-grandchildren of William F. Dart; grandchildren of William A. and Claire T. Dart; children of Robert C. and Katina E. Dart; and beneficiaries of the Robert C. Dart Residual Subtrust	c/o Robert C. Dart Guardian ad Litem Represented by: FOSTER, SWIFT, COLLINS & SMITH, P.C.
Dart Financial Corporation, a Nevada corporation	N/A	Purported Trustee of all of the trusts and the alter ego of W.A. Dart	c/o William A. Dart, President and Treasurer Represented by: BARRIS, SOTT, DENN & DRIKER
The Thomas J. Dart Residual Trust	N/A	T-1	Claims on behalf of T-1 are being asserted by petitioners Thomas J. and Judith L. Dart and their counsel identified above

NAME	AGE	RELATIONSHIP	ADDRESS
Kenneth B. Dart Residual Trust (T-2); Robert C. Dart Residual Trust (T-3); Kenneth B. Dart Residual Subtrust; Robert C. Dart Residual Subtrust	N/A	T-2, T-3	All T-2 and T-3 beneficiaries are represented by FOSTER, SWIFT, COLLINS & SMITH, P.C.; the purported Trustee of T-2 and T-3, Dart Financial Corporation , is represented by BARRIS, SOTT, DENN & DRIKER

VERIFICATION

I declare that this complaint has been examined by me and that its contents are true to the best of my information, knowledge and belief.

Dated: July 7, 1994

Merrill G. Davidoff, Esq.
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103-6365
Telephone: (215) 875-3000
Facsimile: (215) 875-4604

ATTORNEY FOR PLAINTIFFS
THOMAS J. DART AND
JUDITH L. DART.

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE
WILLIAM F. DART TRUST Probate Court No. G-6372

ORDER FINDING PETITIONERS THOMAS J. DART AND JUDITH L. DART IN CIVIL CONTEMPT OF COURT

At a session of said Court, held in the Probate Courtrooms, City of Lansing, County of Ingham, State of Michigan, this 16th day of September, 1994.

PRESENT: HONORABLE DONALD S. OWENS,
PROBATE JUDGE

This Court issued orders on July 29, 1994 and August 5, 1994 requiring Petitioners Thomas J. Dart and Judith L. Dart to show cause why they should not be held in contempt for violating this Court's injuction preventing duplicative litigation. Petitioners filed a response to those orders. The T-2 and T-3 Beneficiary Respondents filed a reply to Petitioners' response. The Trustee Respondents concurred in the T-2 and T-3 Beneficiary Respondents' request to hold Petitioners in contempt. The parties presented oral arguments to this Court on August 18, 1994;

NOW, THEREFORE, for the reasons stated by the Court on the record at the August 18, 1994 hearing;

IT IS HEREBY ORDERED that Petitioners Thomas J. Dart and Judith L. Dart are found in civil contempt of court; Petitioners Thomas J. Dart and Judith L. Dart are not found in criminal contempt of court. Petitioners' oral motion to file additional briefs is denied. Sentencing is deferred until October 14, 1994 at 9:00 a.m. to give Petitioners an opportunity to purge themselves of the contempt.

DONALD S. OWENS
Honorable Donald S. Owens
Ingham County Probate Judge

A TRUE COPY
DONALD S. OWENS
JUDGE OF PROBATE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

THOMAS J. DART, and JUDITH C. DART, individually and derivatively on behalf of DART ENERGY CORPORATION,	:	
Plaintiffs,	:	
v.	:	Case No. 94-1083-Civ-T-24(C)
W.A. DART, KENNETH DART, ROBERT DART, CLAIRE DART, THE KENNETH B. DART RESIDUAL TRUST, THE ROBERT C. DART RESIDUAL TRUST, BENJAMIN O. SCHWENDENER, RICHARD J. RASTALL, DART FINANCIAL CORP., AMERICAN APPRAISAL ASSOCIATES d/b/a STANDARD RESEARCH CONSULTANTS,	:	
Defendants,	:	
and	:	
DART ENERGY CORP.,	:	
Nominal Defendant.	:	

ORDER

This cause comes before the Court for consideration of Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 41(a)(2), for an order Dismissing Without Prejudice Plaintiffs' Claims Against Defendants Dart Financial Corp., the Kenneth B. Dart Residual Trust, The Robert C. Dart Residual Trust, and Nominal Defendant The Thomas J. Dart Residual Trust (Doc. No. 16, filed September 14, 1994) . The Court having considered the Motion, and otherwise being fully advised, it is

ORDERED AND ADJUDGED that Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 41(a)(2), for an order Dismissing Without Prejudice Plaintiffs' Claims Against Defendants Dart Financial Corp., the Kenneth B. Dart Residual Trust, The Robert C. Dart Residual Trust, and Nominal Defendant The Thomas J. Residual Trust (Doc. No. 16) is **GRANTED** to the extent that the claims that Plaintiffs have asserted against Defendants Dart Financial Corp., the Kenneth B. Dart Residual Trust, The Robert C. Dart Residual Trust, and Nominal Defendant The Thomas J. Dart Residual Trust are hereby **DISMISSED without prejudice** pursuant to Rule 41(a)(2), Fed. R. Civ. P. This order shall not operate as an adjudication by this Court on the merits of Plaintiffs' claims raised in this action. It is further

ORDERED AND ADJUDGED that Plaintiffs' Motion Pursuant to Fed. R. Civ. P. 41(a)(2), for an Order Dismissing Without Prejudice Plaintiffs' Claims Against Defendants Dart Financial Corp., the Kenneth B. Dart Residual Trust, The Robert C. Dart Residual Trust, and Nominal Defendant The Thomas J. Residual Trust (Doc. No. 16) is **DENIED** to the extent that the Court will not impose the terms and conditions on this dismissal proposed by Plaintiffs which includes the tolling or suspension of any statute of limitations applicable to Plaintiffs' claims. Plaintiffs have failed to show that they are entitled to the relief they seek and have failed to cite any authority in support of the proposition that the Court's authority to impose "terms and conditions" upon dismissal of an action as contemplated by Rule 41(a)(2) includes the power to toll or stay a statute of limitations. It is further

ORDERED AND ADJUDGED that the clerk is directed to **RETURN** Defense Counsel's letter delivered to the undersigned on September 28, 1994. It is further

ORDERED AND ADJUDGED that Plaintiffs' Motion to Expedite Ruling on Plaintiffs' Motion to Dismiss and to Strike Defendants' September 28, 1994, Letter (Doc. No. 23, filed October 7, 1994) is **MOOT.**

DONE AND ORDERED at Tampa, Florida, this 13th day of October, 1994.

/s/ Susan C. Bucklew
SUSAN C. BUCKLEW
United States District Judge

Copies to:

Counsel of Record

Law Clerk
Courtroom Deputy

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE	File No. G-6372
WILLIAM F. DART TRUST	Hon. Donald S. Owens

ORDER

At a session of said Court held in the Ingham County Probate Court, Ingham County Building, City of Lansing, County of Ingham, and State Michigan, on the 17th day of October, 1994.

PRESENT: HONORABLE DONALD S. OWENS,
Probate Judge

WHEREAS, this Court on October 15, 1993, entered an order Enjoining Petitioners Thomas J. Dart And Judith L. Dart From Prosecuting Duplicative Action (the "Injunction"), and on August 18, 1994 issued an opinion from the bench and on September 16, 1994 entered an Order Finding Petitioners Thomas J. Dart and Judith L. Dart In Civil Contempt Of Court (the "Contempt Order"), holding that their filing of an action in Florida captioned *Dart* v *Dart*, U.S.D.C., Middle District of Florida, Case No. 94-1083-Civ-T-24(c), (the "Florida Action") violated the Injunction, and that in order to purge themselves of the contempt Thomas J. Dart and Judith L. Dart must dismiss the Florida Action, in its entirety, and the parties having stipulated to the provisions and entry of this order in order to permit Thomas J. Dart and Judith L. Dart to purge themselves of such contempt pending appeal;

NOW, THEREFORE,

IT IS HEREBY ORDERED AS FOLLOWS:

1. Before 5:00 p.m., Detroit time on October 18, 1994, Petitioners Thomas and Judith Dart shall cause the Florida Action to be dismissed in its entirety by filing a Notice of Voluntary Dismissal under Rule 41a of the Federal Rules of Civil Procedure. Should they not do so, petitioners Thomas J. Dart and Judith L. Dart shall

appear before this Court on October 19, 1994 at 9:00 a.m. for sentencing under the Contempt Order.

2. Such dismissal shall be without prejudice as to all defendants in the Federal Action and the statute of limitations shall be tolled as to the claims in the complaint filed in the Florida Action on or about July 8, 1994 from the date of such dismissal until 15 days after all appellate review in the courts of Michigan of the Injunction and the Contempt Order shall have been completed, including the decision on any application for appellate review (by appeal, certiorari, or otherwise) to the United States Supreme Court.

3. Neither the consent of the parties to entry of this Order nor entry of this order shall be deemed to waive any claim or defense, procedural or substantive, legal or equitable to the claims in the Florida Action (including the defense that such claims are subject to arbitration).

4. Neither the consent of the parties to entry of this Order nor entry of this Order shall revive any claims or defenses that were already barred by the Statute of Limitations or any other Affirmative Defense as of the filing of the Florida Action.

5. If the Florida Action is refiled in whole or in part, no party shall rely on any assertion of a lack of personal jurisdiction based on any event or change in status occurring between the filing of the complaint in the Florida Action on or about July 8, 1994 and the expiration of the tolling agreement in Paragraph 2 above.

DONALD S. OWENS

Donald S. Owens, Probate Judge

A TRUE COPY
JANELLE A. LAWLESS
PROBATE REGISTER

Approved as to form only — Not approved as to substance:

/s/ Everett R. Zack w/p

Everett R. Zack (P22675)
Michael E. Cavanaugh (P11744)
FRASER, TREBILCOCK, DAVIS & FOSTER
Attorneys for Petitioners
Thomas J. Dart and Judith Dart

Theodore Souris (P20803)
George D. Miller, Jr. (P17755)
Charles N. Raimi (P29746)
BODMAN, LONGLEY & DAHLING
Attorneys for Petitioners
Thomas J. Dart and Judith Dart

David Boies
CRAVATH, SWAIN & MOORE
Of Counsel to Petitioners
Thomas J. Dart and Judith Dart

/s/ James L. Howlett w/p

James L. Howlett (P15187)
Stephen W. Jones (P15594)
Timothy J. Currier (P28939)
BEIER HOWLETT P.C.
Attorneys for Y. Gladys Barsamian; as Guardian ad Litem for the Descendants of Thomas J. Dart

/s/ Eugene Driker w/p

Eugene Driker (P12959)
Stephen E. Glazek (P23186)
Morley Witus (P30895)
BARRIS, SOTT, DENN & DRIKER, P.L.L.C.
Attorneys for Respondents W.A. Dart, Claire T. Dart, and Dart Financial Corporation

/s/ Webb A. Smith

Webb A. Smith (P20718)
Lawrence B. Lindemer (P16694)
Allan J. Claypool (P11957)
FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Respondents Kenneth B. Dart, individually and as Guardian ad Litem, Janice M. Dart, Robert C. Dart, individually and as Guardian ad Litem, and Katina E. Dart

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

THOMAS J. DART, JUDITH L. DART, individually and derivatively on behalf of DART ENERGY CORPORATION,	:	CIVIL ACTION NO. 94-1083-Civ-T-24(c)
Plaintiffs,	:	
v.	:	
W.A. DART, KENNETH DART, ROBERT DART, CLAIRE DART, BENJAMIN O. SCHWENDENER, RICHARD J. RASTALL, ALAN VALADE, DART CONTAINER CORPORATION, AMERICAN APPRAISAL ASSOCIATES d/b/a STANDARD RESEARCH CONSULTANTS,	:	NOTICE OF STIPULATED DISMISSAL
Defendants,	:	
and DART ENERGY CORPORATION, *Nominal Defendants.*	:	

Pursuant to the Stipulated Order dated October 17, 1994 of the Probate Court for Ingham County, Michigan, File no. G-6372, attached hereto as Exhibit "A," and subject to the terms and conditions set forth in that Stipulated Order, plaintiffs Thomas J. Dart and Judith L. Dart do hereby dismiss this Action without prejudice under Federal Rule of Civil Procedure 41(a)(1)(ii).

The terms and conditions of the Stipulated Order attached hereto as exhibit were agreed to by counsel authorized to speak for all defendants herein. See Exhibit "B."

Dated October 18, 1994

Respectfully submitted,

/s/ John R. Taylor

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Of Counsel:

Charles Alan Wright
727 East 26th Street
Austin, Texas 78705

SO ORDERED.

/s/ Susan C. Bucklew

Honorable Susan Cawthorn Bucklew, U.S.D.J.

Court of Appeals, State of Michigan

ORDER

In the Matter of:
The William F. Dart Trust

Docket #176120

L.C. #93-75904 AV

Maura D. Corrigan
Presiding Judge

E. Thomas Fitzgerald

Clifford W. Taylor
Judges

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

A true copy entered and certified by Ella Williams, Chief Clerk, on

November 30, 1994
Date

/s/ Ella Williams
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE WILLIAM F. DART TRUST

Circuit Court No. 94-78939-AV
Ingham County Probate Court
Case No. G-6372

ORDER DENYING PETITIONERS' THOMAS J. DART'S AND JUDITH L. DART'S APPLICATION FOR LEAVE TO APPEAL THE ORDER FINDING PETITIONERS IN CIVIL CONTEMPT OF COURT

At a session of said Court, held in the Circuit Court-rooms, City of Lansing, County of Ingham, State of Michigan, this 12th day of December, 1994.

PRESENT: HONORABLE LAWRENCE M. GLAZER, Circuit Judge.

For the reasons stated by the Court on the record at the November 9, 1994 hearing;

IT IS HEREBY ORDERED, that Petitioners', Thomas J. Dart's and Judith L. Dart's Application for Leave to Appeal from the Order Finding Petitioners in Civil Contempt of Court is denied.

/s/ Lawrence M. Glazer
Lawrence M. Glazer, Circuit Judge

A TRUE COPY
CLERK OF THE COURT
30th JUDICIAL CIRCUIT COURT

Court of Appeals, State of Michigan

ORDER

In re William F. Dart Trust	David H. Sawyer Presiding Judge
Docket #181970	
L.C. #94-78940 AV	Donald E. Holbrook, Jr. William B. Murphy Judges

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

A true copy entered and certified by Ella Williams, Chief Clerk, on

April 7, 1995	/s/ Ella Williams
Date	Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: November 29, 1995

James H. Brickley
Chief Justice

102684 & (13) (14) (16) (17)

Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

In re The William F. Dart Trust,

SC: 102684
COA: 179353
LC: 93-075904

THOMAS J. DART,
Petitioner-Appellant.

On order of the Court, the motions for immediate consideration and for extension of time are considered and are GRANTED. The application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should now be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 29, 1995 /s/ Corbin R. Davis
Clerk

SEAL OF THE MICHIGAN SUPREME COURT
LANSING

ORDER

Michigan Supreme Court
Lansing, Michigan

James H. Brickley
Chief Justice

Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

Entered: November 29, 1995

102851
102852

In re The William F. Dart Trust,

THOMAS J. DART and
JUDITH L. DART
Petitioners-Appellants.

SC: 102851
102852
COA: 181968
181970
LC: 94-78940-AV

On order of the Court, the applications for leave to appeal are considered, and they are DENIED, because we are not persuaded that the questions presented should now be reviewed by this Court.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 29, 1995 /s/ Corbin R. Davis
Clerk

SEAL OF THE MICHIGAN SUPREME COURT
LANSING

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE WILLIAM F. DART TRUST — FILE NO. G-6372 HON. DONALD S. OWENS

MOTIONS

BEFORE THE HONORABLE DONALD S. OWENS

Lansing, Michigan - Thursday, August 18, 1994

10:00 A.M.

RECORD

* * * * *

MR. DAVIDOFF: * * *

Now, counsel in their Contempt Petition and in their Motion today in the renewed Petition and in their argument, did not mention the two pleading and dispositive Supreme Court cases.

And they are the *Donovan case,* which is 377 U.S. 408, and that is a 1964 decision of the U.S. Supreme Court, *Donovan v City of Dallas;* and the second case is the General Atomic Company, which is 434 U.S. 12. That's the 1977 decision.

Now, the *Donovan* case is a much stronger case than it is here. In that case there had been a final State Court judgment; final proceeding and the State Court judgment was final.

They went to Federal Court, they sought an injunction, and the Supreme Court of the United States held you cannot get an Injunction from a State Court to halt a Federal Court proceeding under Federal law. That didn't affect the ability to set up res judicata or collateral estoppel as a defense in the Federal Court suit, it did affect the ability to enjoin a Federal Court proceeding on a Federal cause of action and I will just read the syllabus because I think it's the simplest way: "A State Court cannot enjoin Plaintiffs from prosecuting or appealing an in personam action in a Federal court which has

jurisdiction of the parties, the subject matter, nor can this Federal right be divested by State contempt or other proceedings, even though a Judgment of a State Court, a judgment of a State Court, in the same controversy, has already been rendered against certain Petitioners."

And, then, the case is remanded.

This went up on certiorari. The State Court remanded from the State Trial court to consider whether it would have punished a nurse for contempt knowing that the Restraining Order that Petitioners violated was invalid. And I'm sure that was probably vacated on remand because it was ultra vires.

The Court was without power.

Here we have no Judgment, no final Judgment of this Court. So this is not even as strong a case for a State Court issuing that Injunction as the *Donovan case* was, but held black letter law.

Followed in General Atomic, and I hinge the key for General Atomic, *Donovan* really sets the standard. The key for General Atomic, doesn't matter when the Federal Court claim is filed, whether it's before, at the same time, or after the State Court issues its Judgment, it's nonetheless improper for a State Court to restrain a Federal Court or purport to restrain a Federal Court by issuing an Injunction.

Now, they have, in the Brief that I received, as I said, after 11 o'clock last night, Mr. Zack ably got it to our hotel and we were able to read it. They have cited what we know to be a very narrow exception to that rule; and now I'm trenching out of contempt, Your Honor, and into, I guess, a preview of what will come when I think if Your Honor does the right thing and refuses the Contempt Motion. The real Motion here is the Motion for the Injunction that they're going to seek from Your Honor, the renewed Injunction to restrain the Federal Court proceeding, and they are citing the narrow exception of the *Lida* case.

Princess Lida of Fern v Thompson, and that's known as the Lida Doctrine. It is known as a narrow exception to the Donovan, General Atomic, Doctrine that a State Court has no jurisdiction to enjoin a Federal Court.

And that Doctrine is very simple, where both actions concern a res. So it's got to be an In Rem action; and this was decided in a different era, which I'll address in a moment, a much different era in the Courts.

Then, and only then, there may be an argument, there may be an argument.

Now, I would like to point out what happened in *Princess Lida.*

Your Honor will remember that it wasn't until 1938 that the distinction between law and equity courts was abolished in the Federal system. That was when the Federal Rules of Civil Procedure were first adopted in Michigan and in Pennsylvania. This case arose in Pennsylvania. Thank God I have a little knowledge of that; even though I'm not a Michigan lawyer, I am a Pennsylvania lawyer, and I have been for some time.

I became a Pennsylvania lawyer right at the tail end of the abolition of the distinction between law and equity court in Pennsylvania, really, right at the end of that; although there is still distinctions, they have been largely abolished. I don't know when that occurred in Michigan, it probably occurred after 1938 because it's viewed that the Federal Rules, the new Federal Rules of Civil Procedure were in Vanguard in terms of abolishing distinction between equally and law courts and applying one judge and one court to apply both legal remedies and equity remedies.

This was in a different era though. This case, the *Lida case,* arose in the era of separate law and equity courts. And the case that was brought in State Court in Pennsylvania was brought in the chancellery court, the equity court. It involved the administration of a truth.

The second suit was brought in equity.

In July of 1930 Lida and her son John brought suit in equity in the United States District Court for the Western District of Pennsylvania against the two trustees.

So there were two equity suits arguing about how to reform or fix the same trust, remove the same administrator, and the like.

Now, the same thing happened in the *Cassidy* case that they cited from the 10th Circuit.

Last year, if I can read from that case, that we were able to print out this morning: "In 1990 beneficiaries commenced an action against trustees attacking their administration of the trust and seeking various trust properties. This action was commenced in the United States Court for the District of Texas, based upon diversity jurisdiction. The Texas Federal Court dismissed this action reasoning it lacked subject matter jurisdiction, as follows." Let me stop reading for a second and point out that this, as every other case that I have been able to find in eight and a half hours, since beginning to research this *Lida* issue, it's the Federal Court that makes the determination, not the State Court, of whether or not the Federal court should stand aside.

And continuing: "The relief requested by Plaintiffs would, among other things, require that the court order an accounting of the Trust, interpret the Trust indenture, and to determine whether the Trustees acted in accordance with the terms of the Trust indenture. Such functions are in the nature of an In Rem proceeding, both in the view of this Court and pursuant to an Oklahoma statute,' which I won't cite, 'since this action is In Rem or quasi In Rem, the Court must acquire jurisdiction over the trust estate in order to render a decision which affects the res."

Now, when we brief this, and it hasn't been briefed yet, I want to stress that I want an opportunity, if we're going to continue down this path, which I think is a path that leads us nowhere, but if we're going to continue down this path, I want an opportunity to brief and argue this on a full record. That is the key distinction of the Lida Doctrine.

Both this action and the new action have to be In Rem for a Federal Court to stand aside, and even if they are both In Rem, I do not believe this Court has the power to enjoin a Federal Court.

The Federal Court then has to have the question presented to it as to whether or not it will stand aside, because it is administering the trust.

THE COURT: Yes, thank you.

Now, Mr. Smith, Mr. Davidoff makes the point that proceedings In Personam in Federal Courts cannot be enjoined by the State Courts where there is a personal right to sue under Federal law.

You have indicated that there is an exception to that, which Mr. Davidoff concedes, for proceedings In Rem, and the *Cassidy v Pitts* case, of course, is extraordinarily similar to this, not completely similar, there was at least, on one issue, a final Order in that case, though the Court did reserve jurisdiction.

But its beneficiaries were filing a RICO action against the trustees, considering attacking their administration of the trust.

Well, that's basically what this RICO action is. Yes, it's got some other individuals in it, but basically it is an action against the Trustee concerning the administration of the Trusts and the Trust property, and so it would appear that *Cassidy,* under Federal, interpretation of Federal law, is controlling here, in which they say that, "A suit that concerns or determines the ownership, control, administration of a trust, and the powers, duties, and liabilities of the trustee; is either In Rem or quasi In Rem."

Well, I don't find anything to the contrary, Mr. Davidoff concedes that, that that is the *Princess Lida* exception, and I think that is good law and that's Federal law, so if it's an In Rem proceeding, if it's a proceeding such as we have here, concerning the administration of the Trust and the duties of the Trustee, it is In Rem or quasi In Rem.

Further, under *Princess Lida,* the fact that it's In Rem means, according to the United States Supreme Court in *Donovan versus Dallas,* that the State or Federal Court having custody of the property has exclusive jurisdiction to proceed.

That's not concurrent. The U.S. Supreme Court's exclusive jurisdiction to proceed.

Under *Cassidy versus Pitts* it is my opinion that this is an In Rem or quasi In Rem proceeding, under *Donovan v Dallas* this Court, which has custody of the property, jurisdiction of the Res, has exclusive jurisdiction to proceed.

So I think that's clear, under these cases.

General Atomic says, if it's In Personam you don't, fine, that's right; but this is In Rem.

And I found this very interesting as I was struggling last night about distinctions between In Personam and In Rem, I thought I understood those from law school, those get a little hazy.

A divorce being In Rem, it's hard for me to think of anything more In Personam than the dissolution of the bonds of marriage between individuals.

The In Rem part I know has to do with the property, but to say that the status of the marriage is the Res, and that makes it a property issue, like the existence of a marriage is property, really surprised me a little bit, and I guess I hadn't remembered that from law school.

So the distinctions between In Rem and In Personam seem to blur in certain places and I found myself feeling as though I was preparing for the Bar Exam.

In any event, it does appear that under *Donovan versus Dallas* and *Cassidy v Pitts,* this Court has exclusive jurisdiction over proceedings of a RICO action, a Federal RICO action, that is filed against the trustee, among others.

That's the holding of this Court. I'm holding that.

However, the question is what can this Court do about that? Can this Court enjoin Tom and Judy Dart or is my prior Injunction, if it covers this, valid, or must we wait until the Federal Court, pursuant to the United States Supreme Court's decision, declines jurisdiction?

And that really is a very significant question.

And Mr. Davidoff says that, "Judge, it just says here that the Federal Court should step aside." And that's what it says in *Cassidy versus Pitts.* "The jurisdiction where the last suit was filed must yield." That's the Federal Court.

They said that in that case most of the allegations in the Complaint make preference to the Trust assets or the wrongful acts and representations of the Trustee.

It's not even required that all of the allegations in the Complaint concern the Trust assets or the Trustee, some alle-

gations in the Complaint may concern other things, and, yet, the Court still has jurisdiction under *Cassidy v Pitts.*

It says, "Most of the assets."

So they go on to say that, "The County Court, the Carter County Court, can exercise jurisdiction, had jurisdiction over the Trust, and, therefore, they must hear this matter."

And that the Federal District Court correctly concluded that it was without jurisdiction to hear the beneficiary's claim. Okay.

So if you go to the Federal District Court in Florida and say, "Federal Court, look at these cases here, here is what the U.S. Supreme Court said, and here is what the 10th Circuit Court of Appeals has said, please decline to hear this case."

It appears that that's what they probably should do.

But that's not what you're asking for today. You're asking for me either to enforce the Injunction or, I suppose, you will come back if I don't do that, under the Addendum to the Opinion, and the authority of these cases, and request a new Injunction regarding this RICO action.

THE COURT: Well, looking at *Donovan versus Dallas* here it does, as I say, state the general rule about State and Federal Courts not interfering or trying to restrain, that's issuing Injunction, each other's proceedings. And it says that, "An exception has been made where the Court has custody of property that is proceeding In Rem or quasi In Rem."

What does the word, "exception," mean? Exception to what? Exception to the general rule that State and Federal Courts would not try and restrain each other's proceedings?

That means there is a situation where a State or Federal Court could restrain the other's proceedings when it's In Rem or quasi In Rem.

That's what *Donovan v Dallas* says.

Now, that's the United States Supreme Court speaking.

Now, it's true, as Mr. Davidoff read, that while Congress has authorized Courts of the United States to restrain State Court proceedings in special circumstances, it's no way relaxed the old and well established judicially-declared rule that, "State Courts are completely without power to restrain Fed-

eral Court proceedings" in what, "In Personam jurisdiction," because, because, "In Rem jurisdiction is subject to restraint, In Personam is not."

The United States Supreme Court has made that clear, and I'm unaware of any authority that *Donovan* has been overruled, and *Princess Lida* has been overruled.

So, I am compelled to follow the Federal law here, United States Constitution, United States Supreme Court's decisions, and hold that this is In Rem.

And the *Cassidy versus Pitts* case makes that clear, or quasi In Rem; and under *Donovan v Dallas,* that the State Court has authority to restrain the proceedings in the Federal Court.

Again, I'm not talking about restraining the Federal Court from hearing something, I'm talking about restraining the individual litigants from filing or pursuing such a claim.

I think the law is abundantly clear. I think that's an accurate reading of the law and I do not feel that I'm overstepping my authority, but merely following precedents.

Now, the question is, given this Court's authority to do that, did we do it, or can we do it?

Now, the question is, can we do it? The answer is, yes.

I think as my Order and my Addendum to the Opinion make clear, the Court has jurisdiction, according to these cases, we have exclusive jurisdiction, but we at least have concurrent jurisdiction, which is conceded by the Petitioner.

Now, Petitioner says, "Well, I said it, but I don't really necessarily believe it."

And I think there is an argument to be made. Well, if you come into Court and assert jurisdiction then the other side can say, "No, you don't have jurisdiction," but I don't think you can come in and assert it, and say in the next breath, "But we don't really think you have that."

I don't think we can do that. I think they are stuck with their position, that the Court does have at least concurrent jurisdiction to hear the Federal RICO claim.

I realize the uncertainty that counsel has has to do with the Federal decision, the Courts of general jurisdiction can hear these.

Again, I think that is based on the fact that it has to be a court that would hear both law and equity matters, and this Court can because we are a general jurisdiction court when it comes to matters of trusts and estates.

So I think that would cover us, as well.

So, could this Court issue an Injunction against Tom and Judy Dart from pursuing the Federal suit? Yes, we could.

Did we? Did we? That's the next question.

Now, Mr. Davidoff argues that this is a different claim or suit, that is, the Federal RICO was a different claim or suit than the Florida RICO action, and he says it is because they're different people involved. I think there's some additional people who were not defendants in the Florida matter, isn't that right?

MR. DAVIDOFF: Yes, Your Honor. There are other reasons why we —

MR. SMITH: No —

THE COURT: But aren't there additional individuals?

MR. SMITH: The original State Court action.

THE COURT: Did that include Schwendener and Restall, and Valade?

MR. DRIKER: It did.

MR. SMITH: It did the same as the current case before Your Honor and the current Federal case.

THE COURT: So he's saying that the law is slightly different, though.

The problem is, the theory is the same, the Racketeering Inspired and Corrupting Organizations Act.

The theory is the same, the facts are virtually identical, and to make a slight change in the facts then to be able to claim that, well, this doesn't come within it because we have changed a word here or there, or added an allegation that came up recently, makes this entirely different, I don't think holds water.

It appears to me that the idea under the Federal decisions is that a matter such as this should all be heard in the Court that has jurisdiction of the Res, the Trust Res, and of the parties.

The individuals, the Petitioners, here have filed this Federal action in the State Court in Michigan, in this Court, they have amended their pleadings.

I believe that this action of filing the Federal suit does come within the Injunction which this Court issued on October 15th. Notwithstanding there may be some technical distinctions, I think they are distinctions without a difference. I think the substance is the same.

That the Courts, the Federal Court said parties didn't have to be identical, that they were substantially the same, for example. So I feel that this action that's been filed in the Federal Court does come within the purview of this Order.

Now, Tom and Judy Dart argue that, well, it wasn't absolutely clear, and so we could go ahead and do it.

The other side said that you had a duty to clarify it.

Well, I always thought the Courts spoke through their Orders and what the Order literally said is what controlled, and we didn't have a lot of this spirit business and broadly interpreting orders that could have criminal consequences, but they cite these Federal cases that say that. That there's some duty to clarify the Order before you act, as Mr. Howlett did last year.

I honestly, though, can't find on the evidence that I have that there is evidence beyond a reasonable doubt that Tom and Judy Dart were contemptuous. I just can't find that.

So I don't think there is sufficient evidence of that.

I do, however, think that there is sufficient evidence that is clear and convincing, that there was civil contempt here, that they did this because they weren't succeeding in the Florida action, or the Michigan action, and they wanted to get this filed in Federal Court.

Good faith. As I recall, one of these decisions goes to the sentence rather than to the fact of the contempt: If there is a violation, a knowing violation of the Court's Order, and I do find that there was a knowing violation, based on the pleadings, based on the admissions in their own pleadings, that these were identical or substantially similar.

So I do find that there is civil contempt here.

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE	FILE NO. G-6372
WILLIAM F. DART TRUST	HON. DONALD S. OWENS

PETITIONER'S MOTION FOR STAY
-and-
SENTENCING

BEFORE THE HONORABLE DONALD S. OWENS

Lansing, Michigan - Friday, October 14, 1994

9:00 A.M.

THE COURT: The issue, initially, is whether Thomas and Judith Dart have purged themselves of contempt.

Now, I found they were in contempt. I may have been wrong, the appellate courts will tell me if I was wrong. If I am wrong, I will do it differently the next time, I will correct the error. We are all human, we all make mistakes. I try to make as few as possible, but we all do, there is no question about that.

In any event, with all due respect to the Federal Court and our Federal System of Justice, I found that I was bound by the decisions of the United States Supreme Court in *Princess Lida* and the 10th Circuit Court of Appeals, as I know their interpretation of that. Although that's not our Circuit, obviously, but still it was a very recent case indicating that *Princess Lida* still is good law. And applying that law to the facts, I found that they were in contempt.

Not wishing to send them to jail, wishing instead to obtain the proper result, since I'm not personally vindictive or interested in punishing anybody, I just want the law to be followed and the case to proceed according to the law, I gave them, I believe, almost two months to purge themselves of the contempt thinking that that was an adequate amount of time.

Now, it's true that what I said was that they could purge themselves by withdrawing the Federal Action, because they

had already filed the RICO action in Michigan and the law indicated we did have concurrent jurisdiction to hear that. And for all the reasons cited at our previous Hearing, I found that they should withdraw that action.

Nobody raised the issue of withdrawing part of it and would that satisfy the Court, and perhaps if they had I might have decided differently, I don't know; but we didn't have any argument on that issue at that time so that wasn't before the Court.

So the request was that they be found in contempt for filing that, and that they be required to dismiss that; and I found for those parties asserting that position and ordered that they were in contempt and that they could purge themselves by withdrawing that action.

Now they have withdrawn part of it and you have asserted, Mr. Boies, that by doing that they are no longer in contempt.

The other side, however, asserts that merely withdrawing or deleting some of the parties to that action, the Trusts, and the current Trustee, the Corporate Trustee, that that means that the Trusts are no longer involved and the Trustee is no longer involved in that action, and, therefore, this court has no interest in that.

They assert that the pleadings were not changed, just the defendants believe it, and that the pleadings are replete with issues concerning the Trusts and the actions of the Trustee, and that, therefore, the Trusts and the Trustee are still involved, even though they are not named as defendants.

And that the issues in that case are nearly the same issues that would be in that RICO action here in Michigan, which I understand now has been withdrawn but had been filed and it was asserted that Michigan had jurisdiction, concurrent jurisdiction, to hear the Federal RICO action.

I do believe that the Trusts and the Trustee are really inextricably a part of this Federal RICO action and that dismissing the Trusts as defendants, and the Corporate Trustee as a defendant, does not mean that the Trusts and the Trustee are not still involved in that.

I don't believe the Corporate Trustee became a Trustee until long after these things occurred. I think it was 1989, and I believe at the time the Complaint was starting in 1984, and so forth, W.A. Dart was the Trustee and entered into this Reorganization and, therefore, he is still a defendant; maybe as an individual now, but certainly all of this has to do with his actions as Trustee.

And I believe that Tom Dart's and Judith Dart's pleadings in the Federal District Court make that clear.

Let's see, on Page 3 it says: "At all times material hereto, W.A. Dart has acted as Trustee of T-1, T-2, and T-3, and it was from March '76 until October '89 that he was Trustee, and that after he purportedly substituted a company . . ." though I think the argument is that that was really just a screen and he was really still in control, and so forth.

So it appears to me that the Trusts are still involved, the Trustee is still involved. The Trustee at the time of these alleged improper actions, and the RICO suit, is still a defendant. He has not been dismissed as a defendant. And, therefore, it is my opinion that Thomas and Judith Dart have not purged themselves of contempt and have not complied with this Court's Order.

Now, the matter was set for sentencing today. Really, the only sentence, as I understand under the law, is that they be confined in the Ingham County Jail until they purged themselves of contempt. This isn't like a criminal case where we can decide the amount of the fine or the amount of time in jail, and, so, while I say that, I think at this point, since they have not availed themselves of almost two months to purge themselves of contempt, that I really have no choice but to send them to jail until they do purge themselves of contempt.

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE	FILE NO. G-6372
WILLIAM F. DART TRUST	HON. DONALD S. OWENS

MOTIONS

BEFORE THE HONORABLE DONALD S. OWENS

Lansing, Michigan - Friday, August 19, 1994
9:00 A.M.

THE COURT: Well, I certainly can see how upon hearing the report that you allege here of Tom Dart, and reading the reports in the media, I think they were all written media reports, weren't they, they were all newspapers?

I don't think it was TV or radio?

MR. HOWLETT: No. Newspaper reports, Your Honor.

The court: That you certainly could become alarmed: Renouncing citizenship, moving overseas, getting security, having security guards, moving large amounts of money and property overseas, certainly would appear suspicious on its face that perhaps they were concerned that they may not win and so we're trying to remove assets and them personally from the jurisdiction of the Court.

Now, the problem is, as the other side says, you don't have any proof of that. It's all hearsay. And that's a valid point.

I don't know how you're going to get proof. I haven't authorized you to hire private investigators, for example. So it could be difficult, unless Ken or Bob came to Court and were questioned on those issues and admitted that's what they were doing.

The other side says that there may be lawful business reasons for transfers, it's a world-wide corporation; because perhaps they feel that business prospects in other countries are better than in this country.

Are they renouncing their citizenship, and if so, is it to avoid this Court or is it to seek tax advantages?

First of all, I don't know if they have renounced their citizenship because it is just hearsay; but if they have, I suppose a legitimate argument could be made that it is for tax reasons.

There was an extraordinarily high percentage increase in the top marginal tax rate a year or so ago of individuals, income tax rate of individuals. Our government is talking about a very substantial increase in the cost of doing business. In terms of all of these different possible health care plans, one could see how individuals could become very apprehensive about what the tax and regulatory future would be here and wish to go elsewhere.

I have no idea if that's their feeling. There is any validity those fears, if that's why they're doing it. I don't know.

Are they reallocating assets abroad because of better business opportunities?

Clearly, this one corporation anyway, Dart Container, has become extraordinarily profitable and whoever is running it seems to have been very successful in their business decisions; almost wildly successful, given the growth of that business.

And, so, it makes it more difficult for one to, an outsider, to question their business judgment, when they have such a remarkable track record of success.

You have requested that the Court order them to return assets to the United States, possibly even to the State of Michigan; but, certainly, to the United States, and not take any money abroad other than what the Court permits for legitimate business purposes.

There is no way that I'm going to be able to decide how to run that Corporation. I have a hard enough time keeping up with pleadings in this case, let alone running world-wide corporations; and while other judges sometimes do take over the running of prison systems, or school systems, or other things like that, I am not going to do that. I don't think that's the role of the State Trial Courts to do that.

So, I think that you have fears, I think that there are things that alarm you, but there's no proof.

On the other hand, there are valid business reasons why they may be doing these things; and, so, I feel that this remedy is far too drastic and extraordinary.

I don't think a Trial Court should do this. So I'm going to have to deny it.

It would be an unwarranted assumption that they were going to lose this case. It would be an unwarranted usurpation of their authority for me to run their business, for the Court to essentially take over their business. You don't have any right to accountings or reports, status situations, T-2 and T-3, only T-1.

So for the reasons indicated by Mr. Driker I'm going to have to deny your request. I just can't do it.

MR. RAIMI: Your Honor?

THE COURT: Yes.

MR. RAIMI: It was also a request for expedited discovery to attempt to obtain the personal knowledge on these issues. Would we be allowed to proceed with that or has the Court ruled on that, I guess is my question?

MR. DRIKER: The law is clear, Your Honor, that we cited in our Brief, you can't get discovery about the assets of a defendant before you have a Judgment, that's putting the cart before the horse. That's pretty basic law.

THE COURT: That's my understanding of the law, yes, I agree. I would have to deny that request.

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM
30TH JUDICIAL CIRCUIT

IN THE MATTER OF THE WILLIAM P. DART TRUST

Docket No. 94-78740-AV
HON. LAWRENCE M. GLAZER

MOTIONS RE APPLICATIONS FOR LEAVE TO APPEAL

November 9, 1994 - Lansing, Michigan

(Proceedings resumed at about 4:12 p.m.)

THE COURT: I have reviewed the Complaints filed in the Florida state action, in the Florida federal action, and they recite the same facts and they recite the same harm. And although technically they ask different remedies, since one is pursuant to a particular state statute and the other is pursuant to a particular federal statute, essentially there is no difference between those two. They are the same claim. They do constitute, in my view, the same claim. And therefore I'm going to deny leave to appeal the contempt. Filing a pleading which is in and of itself a contempt arises to the level of misconduct which would justify revocation of pro hac vice admission. So even if I agree with the plaintiffs that this was a revocation rather than a denial nunc pro tunc, I still reach the same conclusion that it was not an abuse of discretion. And therefore the leave to appeal is denied on that as well, because in both cases I don't see any merit.

I will sign an order in accordance with that. Thank you.

No. 95-1410 (2)

Supreme Court, U.S.
FILED
APR 1 1996
CLERK

In The Supreme Court of the United States

October Term, 1995

THOMAS J. DART, et al.,
Petitioners

v.

W. A. DART, et al.,
Respondents

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Michigan

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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48 pp

QUESTION PRESENTED

Whether the Michigan Probate Court erred in concluding that, under the particular facts of this case, Petitioners' RICO claim was *in rem* or *quasi in rem* and therefore enjoinable under this Court's ruling in *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939).

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I.

STATEMENT OF THE CASE

In February 1992, Petitioner Tom Dart filed the present lawsuit against his parents and brothers in Ingham County (Michigan) Probate Court, challenging the reorganization of trust assets to which he had expressly agreed over five years previously. After the Michigan Probate Court dismissed most of his claims based on the statute of limitations, Tom married Petitioner Judy Dart, who joined the trust litigation. Then, after almost a year and a half of unsuccessfully litigating the claims they brought in the Michigan Probate Court, Petitioners filed a similar lawsuit in Florida state court, again claiming that the trust reorganization was improper. Sarasota County (Florida) Circuit Court First Amended Complaint, September 14, 1993. (Resp. App. A 2a-4a.)

Petitioners never identified any harm in having to litigate all their claims in Michigan, since, after all, they are Michigan residents, the reorganization took place in Michigan, and they had originally chosen to litigate in the Michigan forum. Moreover, Petitioners insisted that *only* the Michigan Probate Court had jurisdiction over the trusts: "The consequence of the Probate Court's exclusive jurisdiction is that 'no other forum has the jurisdiction to hear and determine the action.'" Petitioners Memorandum of Law in Response to Brief in Support of Motion to Compel Arbitration and Stay The Proceedings (May 12, 1992). (Resp. App. B 6a.)

After lengthy hearings and briefing, the Michigan Probate Court ruled that Petitioners should be enjoined from maintaining similar claims concerning the trusts in other forums. *See* Order Enjoining Petitioners Thomas J. Dart and Judith L. Dart From Prosecuting Duplicative Litigation. (Pet. App. 1a.) The Michigan Probate Court specifically found that the duplicative Florida suit was an attempted "end-run" around rulings of the court, and it constituted "oppression." Tr. September 29, 1993. (Resp. App. C 8a.)

The Circuit Court affirmed the injunction. Order Affirming Injunction, May 17, 1994. (Resp. App. D 10a.) The Michigan

Court of Appeals subsequently denied Petitioners' application for leave to appeal for lack of merit. (Pet. App. 61a.) Petitioners attempted no further appeals, conclusively establishing the validity of the injunction.

Despite having already been found to have engaged in forum-shopping and ordered to desist, on July 8, 1994, Petitioners filed yet *another* lawsuit, this time in Florida federal court, alleging that the trust reorganization was a violation of the federal RICO act. 18 U.S.C. § 1961, *et seq.* (Pet. App. 8a-51a.) In the RICO complaint, they essentially claimed that Tom Dart's parents and brothers engaged in a criminal racketeering enterprise designed to destroy his trust. (Pet. App. 8a.)[1] Petitioners did not ask the Michigan Probate Court for clarification of the scope of the injunction before filing their federal lawsuit, or notify the court that they were planning such a lawsuit.

Petitioners say they were forced to violate the injunction without first seeking clarification from the Michigan Probate Court, because the four year RICO statute of limitations was about to expire on July 11, 1994. (Petition, p. 4.) However, Petitioners have concealed some crucial facts from this Court. Their Petition fails to disclose that on July 8 and 11, 1994, they also filed new pleadings in the Michigan Probate Court, asserting the very same federal RICO claims as in their Florida federal suit. *See* Tom and Judy Dart's Civil Complaint, July 11 1994. (Resp. App. E 12a-21a.)[2] Consequently, there was no need to run to Florida to assert the federal RICO claims, since these claims were part of the Michigan Probate case and state courts have concurrent jurisdiction over federal RICO claims. *See*, *Taffin v. Levitt*, 493

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[1] This was a rehash of the claim in their prior Florida state court action that the defendants "engaged in a pattern of criminal activity through an enterprise . . . and have conspired to purposefully defraud the plaintiffs . . . ." (Resp. App. A 4a ¶ 149.)

[2] The other two Michigan Probate Court pleadings, Judy Dart's First Amended Petition, and Tom Dart's Second Amended Petition, contain virtually identical RICO claims as their Civil Complaint (which is attached as Resp. App. E 12a-21a).

U.S. 455 (1990). Petitioners avoided any statute-of-limitations problem by filing the RICO claims in the Michigan Probate Court.[3]

Petitioners later voluntarily dismissed their federal RICO claims from the Michigan Probate case, to make it look as if they have been deprived of the right to litigate these claims. Notice of Voluntary Dismissal, September 2, 1994. (Resp. App. H 27a-28a.)

On July 29, 1994, respondents petitioned the Michigan Probate Court for an order to show cause why Petitioners should not be held in contempt for violating the injunction. The hearing was adjourned at Petitioners' request and the parties filed briefs addressing the issue that Petitioners now raise before this Court.[4] After considering the briefs and oral arguments, the Michigan Probate Court found Petitioners in civil contempt, holding that Petitioners knowingly violated the injunction. (Pet. App. 75a.) The Michigan Probate Court found that the federal RICO claim was virtually identical to the previous claim under Florida's criminal enterprise statute and so was covered by the injunction. (Pet. App. 75a.) Noting that "basically [Petitioners' federal suit] is an action against the Trustee concerning the administration of the Trusts and Trust property," and therefore is *in rem* or *quasi in rem*, the Probate Judge relied on federal precedents in determining that the injunction could properly be enforced against Petitioners. (Pet. App. 70a-75a.)

The Michigan Probate Court deferred sentencing for two months to give Petitioners the opportunity to purge the contempt

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[3] Further, Petitioners contend they only realized at the last minute that they had a RICO cause of action, because they had just discovered a crucial July 11, 1990, meeting between Tom Dart and W.A. Dart. (Petition, p. 4.) Yet Petitioners' own pleadings prove that they and their counsel had known all about that meeting for years. *See* Tom Dart's First Amended Petition (October 2, 1992) ¶ 77 (specifically complaining about the July 1990 meeting). (Resp. App. F 23a.) *See also* W.A. Dart's Deposition Tr. August 26, 1992 (where Petitioners' counsel interrogated W.A. Dart about the July 11, 1990, meeting). (Resp. App. G 25a.)

[4] Petitioners suggest they were not allowed to brief or argue the *in personam/in rem* issue, but Petitioners' counsel did argue the issue at the August 18th hearing. The Michigan Probate Court expressly addressed the doctrines and precedents cited by Petitioners. (Pet. App. 70a-75a.)

by dismissing their federal lawsuit. (Pet. App. 76a.) *See also*, Order Finding Petitioners Thomas J. Dart and Judith L. Dart in Civil Contempt of Court. (Pet. App. 52a.) In the interim, Petitioners made some cosmetic modifications to their Florida federal complaint, dismissing Dart Financial Corporation and the trusts as defendants. At the sentencing hearing on October 14, 1994, the Michigan Probate Court held that "the Trusts and the Trustee are really inextricably a part of this Federal RICO action and that dismissing the Trusts as defendants, and the Corporate Trustee as a defendant, does not mean that the trusts and the Trustee are not still involved in that." (Pet. App. 77a.) Further, the Michigan Probate Court noted that the federal complaint said: " 'At all times material hereto, W.A. Dart has acted as Trustee of T-1, T-2, and T-3. . . .' " (Pet. App. 78a.) The court concluded: "[T]he Trusts are still involved, the Trustee is still involved. The Trustee at the time of these alleged improper actions, and the RICO suit, is still a defendant." (Pet. App. 78a.)

In light of this ruling, Petitioners avoided sanctions by means of a stipulated Order "to permit Thomas J. Dart and Judith L. Dart to purge themselves of such contempt". (Pet. App. 56a.) The order further provided that if Petitioners dismissed the Florida federal suit in its entirety by the end of business on October 18, 1994, the RICO statute of limitations would be tolled and the dismissal would be without prejudice; however, if they failed to do this, Petitioners would be sentenced for contempt on October 19, 1994. Petitioners immediately dismissed the federal suit. Notice of Stipulated Dismissal. (Pet. App. 59a-60a.) Because they purged themselves of contempt, Petitioners were never sanctioned.

The Michigan appellate courts affirmed the order finding Petitioners in contempt. The Circuit Court subsequently denied Petitioners' application for leave because it lacked merit (Pet. App. 82a), as did the Court of Appeals. (Pet. App. 63a.) Finally, the Michigan Supreme Court denied Petitioners' application for leave to appeal. (Pet. App. 65a.) None of the Michigan courts issued written — let alone published — opinions.

This case has been pending for more than four years. Petitioners slowed the proceedings to a virtual standstill by filing over a dozen interlocutory appeals, from almost every significant adverse ruling,

and filing duplicative lawsuits in courts outside Michigan. Finally, however, trial is scheduled to begin later this year, unless Petitioners succeed in further delaying the case by means of their pending Petition.

II.

SUMMARY OF ARGUMENT

This Court should not grant review of the unpublished interlocutory orders as requested by the petition.

First, the appeal is moot since Petitioners purged the contempt by complying with the Michigan Probate Court's injunction. "Purging ends the state of contempt and thereby extinguishes any contempt appeal." *In re Grand Jury Subpoena*, 955 F.2d 670, 672 n.3 (11th Cir. 1992).

Second, there is no final judgment or order to review. Civil contempt orders against parties are not final for purposes of appeal, even after sanctions are imposed (and here no sanctions have been imposed).

Third, the Petition challenges the validity of the injunction, even though Petitioners previously exhausted their appeals from the injunction. A party cannot collaterally attack the underlying injunction in a contempt proceeding, particularly where the injunction has already been conclusively affirmed on appeal.

Fourth, there is no genuine conflict in the reported cases warranting this Court's intervention. All the cases agree on the law concerning injunctions against federal litigants. Petitioners merely contend that the Michigan courts erred in applying the law to the facts of this case.

Finally, the decision of the Michigan Probate Court was perfectly correct on the merits. The federal RICO suit was *in rem*

or *quasi in rem*, as it directly involved the trusts and the trust assets, and thereby interfered with the Michigan Probate Court's jurisdiction over the trust estate.

III.

REASONS FOR DENYING THE WRIT

A. PROCEDURAL BARRIERS TO REVIEW

Petitioners have already had multiple levels of appellate review. There are no exceptional circumstances warranting further review by this Court — indeed, there are compelling reasons not to grant review.[5]

1. The Appeal is Moot Since Petitioners Purged The Contempt

Petitioners purged the contempt and avoided sanctions by dismissing their federal lawsuit. In so doing, they waived appellate review of the contempt finding.

" 'A long line of precedent holds that once a civil contempt order is purged, no live case or controversy remains for adjudication. . . .' Once a contemnor has purged his contempt, he sacrifices his ability to challenge the merits of the underlying contempt order. . . ." *In re Grand Jury Subpoena*, 955 F.2d at 672 (quoting *In re Campbell*, 628 F.2d 1260, 1261 (9th Cir. 1980)). Thus in *In re Hunt*, 754 F.2d 1290 (5th Cir. 1985), a party was held in contempt for violating an anti-suit injunction which prevented him from prosecuting certain litigation. He abandoned the litigation, and the court held: "[T]he issue of the propriety of

---

[5] The Michigan Supreme Court denied leave to appeal because it was "not persuaded that the questions presented should now be reviewed by this Court." (Pet. App. 65a.) This could either mean that the Michigan Supreme Court considered the contempt appeal to be untimely because it was a belated collateral challenge to the injunction, or because the contempt had been purged, or because it was interlocutory. This ambiguous ruling is yet another reason why the case is not appropriate for this Court to consider.

the contempt judgment . . . is moot. Generally, the discharge of a civil contempt . . . moots any appeal of the contempt judgment." 754 F.2d at 1293.

2. The Contempt Order Is Unreviewable Because It Is Not Final

In addition, the contempt finding is not a final appealable order. First, the contempt finding is not final because the Michigan Probate Court did not impose any sanction on Petitioners. *See Jacobsen v. U.S. Postal Service*, 993 F.2d 649, 662 (9th Cir. 1992), which held "an adjudication of civil contempt is not appealable until sanctions have been imposed." (Quoting *Donovan v. Mazzola*, 761 F.2d 1411, 1417 (9th cir. 1985)). Second, even if sanctions had been imposed, a civil contempt order entered against a party is interlocutory and cannot be appealed until after final judgment. *Fox v. Capital Co.*, 299 U.S. 105, 107 (1936) ("The rule is settled in this Court that except in connection with an appeal from a final judgment or decree, a party to a suit may not review upon appeal an order fining or imprisoning him for the commission of a civil contempt"); 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶110.13 (2d ed. 1995) ¶110.13(4), pp. 148-149 ("a sentence of civil contempt . . . is a nonappealable interlocutory order"). Thus, there is no "final judgment or decree" that could confer jurisdiction on this Court. 28 U.S.C. § 1257.

Petitioners cite *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), to suggest that a civil contempt order is properly reviewable by this Court. (Petition, p. 9 n.4.) Contrary to Petitioners' assertion, *General Atomic* did not involve a contempt order, so there was no occasion to consider the finality or reviewability of contempt orders. In *General Atomic*, the Court granted certiorari to review an injunction and a writ of prohibition, which are reviewable on wholly independent statutory grounds not applicable here. *See* 28 U.S.C. § 1292(a)(1); *Madruga v. Superior Court of California*, 346 U.S. 556 (1954) (the "State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257."). Therefore, Petitioners' reliance on *General Atomic* is misplaced.

3. The Validity Of The Injunction Cannot Be Collaterally Challenged In This Contempt Proceeding

On the one hand, Petitioners state that their unsuccessful appeals of the injunction "are not at issue in this Petition," and that they are only seeking review of the finding of contempt (Petition, p. 4). On the other hand, their very first question for review asks whether the Michigan Probate Court erred when it "enjoined petitioners from exercising their right. . . ." (Petition, p. i). The rest of the Petition is *entirely* devoted to a collateral attack on the injunction. This is improper.

A party cannot collaterally attack the propriety of an injunction through contempt proceedings. "It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948). Even an *unconstitutional* injunction cannot be collaterally attacked in a contempt proceeding. *Walker v. Birmingham*, 388 U.S. 307 (1967) (affirming the contempt finding and refusing to decide the constitutional challenge to the injunction because "defendants were precluded from attacking it in this collateral proceeding").

Petitioners already appealed the validity of the injunction and lost. Petitioners cannot now collaterally contest the validity of the injunction in this contempt appeal.[6]

---

[6] Petitioners suggest that this Court can review the injunction in connection with the contempt appeal, relying on *General Atomic* (Petition, p. 9, n. 4). However, in that case there was no prior exhaustion of appeals from the injunction, no contempt adjudication, and no collateral attack on the injunction. The matter came to this Court directly on review of the validity of the underlying injunction.

Petitioners may argue that they never raised this challenge to the injunction before because they did not realize the injunction would preclude them from filing an action in federal court. However, this argument is refuted by the Michigan Probate Court's findings that they committed "a knowing violation" of the injunction by filing in federal court and they deliberately filed in federal court because they "weren't succeeding in the Florida action, or the Michigan action." (Pet. App. 75a.) The Petition does not raise this as a formal question presented for review because the Michigan Probate Court's finding that they defied the injunction raises only a fact-bound issue of state law.

B. THE PETITION DOES NOT PRESENT ISSUES WORTHY OF THIS COURT'S REVIEW

1. There Is No Conflict Regarding The Applicable Law

Petitioners contend that the orders of the Michigan courts in this case are in conflict with the decisions of this Court. (Petition, pp. 9-12). But the Michigan courts did not disagree with legal principles embraced in the decisions of this Court. Instead, the Michigan courts expressly *relied on* the rule of law that this Court announced in *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456 (1939), *General Atomic*, 434 U.S. 12 (1977), and *Donovan v. Dallas*, 377 U.S. 408 (1964) — a state court cannot enjoin *in personam* federal actions, but can enjoin litigants from pursuing *in rem* and *quasi in rem* federal actions that would interfere with the administration of an estate.

The only issue is whether, given the particular circumstances of the trust assets and the nature of Petitioners' RICO claims, Petitioners' federal action is *in personam* or *in rem* or *quasi in rem*. That is a narrow, fact-bound issue without wide-ranging application to other cases. The Court should not grant this Petition, since "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (SUP. CT. R. 10(C)).

2. There Is No Genuine Issue Whether State Law Applies To The Determination That An Action Is *In Personam* or *In Rem*

There has never been a dispute in this case whether state or federal law governs the validity of an injunction preventing parties from prosecuting a federal lawsuit. The Michigan Probate Court stated: "I am compelled to follow the Federal law here, United States Constitution, United States Supreme Court's decisions, and hold that this is In Rem." (Pet. App. 73a.)

In order to demonstrate a conflict, Petitioners first need to show that there are different rules, otherwise it is a "false conflict". *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797

(1985). There is no hint in any of the cases cited by Petitioners that there is a federal rule for deciding whether an action is *in rem* that varies in any way from the rule of any state or the rule that the Michigan courts applied. Petitioners' attempt to demonstrate that the courts are "divided" proves nothing except that the application of undisputed legal principles to differing facts often yields differing results.

Petitioners distort the facts in an attempt to state an appealable issue, claiming that "the Michigan courts appear to have applied (at best) their own state law concepts of an in rem, quasi in rem and in personam jurisdiction. . . ." (Petition, p. 14). The record demonstrates that the Michigan courts did not invoke state law. Instead, the Michigan courts relied entirely on federal precedent on this issue — *Princess Lida*, *Donovan v. Dallas*, and the strikingly similar case of *Cassity v. Pitts*, 995 F.2d 1009 (10th Cir. 1993). (Pet. App. 70a-75a.)

3. There Is No Genuine Issue Whether The State Court Has The Authority To Determine That An Action Is *In Personam* or *In Rem*

Without citing any direct authority, Petitioners argue that the Michigan Probate Court should not have even attempted to decide whether the action was *in rem* — that the decision had to be left to the federal court. (Petition, pp. 15-16.) This is inconsistent with *Princess Lida*, *Donovan v. Dallas*, and *General Atomic*. In *Princess Lida*, the state court made the determination as to the nature of the federal action, and this Court upheld this decision. In *Donovan v. Dallas* and *General Atomic*, the state court also made the determination of whether the action was *in rem* or *in personam*. If the rule that Petitioners urge were correct, this Court would have overturned the state court action simply by virtue of the fact that the state court had made the determination. The Court did not take that approach. Therefore, Petitioners' theory that a state court may not decide whether an action is *in rem* or *in personam* fails.

4. The Probate Court Correctly Ruled, Under The Unique Facts Of This Case, That Petitioners' RICO Claim Was *In Rem* Or *Quasi In Rem*, Because It Centers On The Administration Of A Trust And The Duties Of The Trustee, And Interferes With Prior State Court Jurisdiction Over The Trust

Stripped of its verbiage, the Petition presents only one issue — the fact-bound inquiry of whether in this particular case the Michigan Probate Court erred in concluding that Petitioners' RICO action was *in rem* or *quasi in rem*. Everyone agrees that if this particular RICO action was *in personam*, then *Donovan v. Dallas* and *General Atomic* apply and there should have been no finding of contempt. Likewise, everyone agrees that if it was *in rem* or *quasi in rem*, then *Princess Lida* applies and the contempt finding was permissible. Petitioners have not shown that there is any confusion in the lower courts concerning application of these rules or that review of the Michigan decision would have any significance outside of this particular dispute. The issue is therefore not of sufficient importance to warrant this Court's attention.

In any event, the Michigan Probate Court's ruling was correct. The Michigan courts followed this Court's settled rule:

> [w]here the judgment sought is *strictly in personam*, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. On the other hand, if the two suits are *in rem, or quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of one court must yield to that of the other. *We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other*, is not restricted to cases where property has been actually seized under judicial process

> before a second suit is instituted, but applies as well where suits are brought to marshall assets, *administer trusts*, or liquidate assets, and in suits of a similar nature where, to give effect to its jurisdiction, the court must control the property.

Princess Lida, 305 U.S. at 466 (emphasis added) (citations omitted). Petitioners' reliance on cases that bar a state court from enjoining parties from pursuing strictly *in personam* federal actions is misplaced, since these same cases explicitly recognize the *Princess Lida* exception for *in rem* and *quasi in rem* cases. *E.g.*, *Donovan v. Dallas*, 377 U.S. at 412.

In assessing the nature of the Florida federal action, the Michigan Probate Court relied extensively on *Cassity*, *supra.*, which is almost exactly on point. (Pet. App. 70a-73a.) There, when trust beneficiaries received adverse results in a state probate court proceeding concerning alleged breaches of duty by the trustee, they filed a federal court RICO action seeking damages for the trustee's misrepresentations. The Federal District Court yielded jurisdiction to the state probate court. The Court of Appeals affirmed, noting that the beneficiaries could bring their federal RICO claims in state court. The court flatly rejected the beneficiaries' argument that RICO claims for money damages were strictly *in personam*. The court followed *Princess Lida*, explaining that a suit is *in rem* or *quasi in rem* if it "concerns or determines the ownership, control and administration of a trust and the powers, duties and liabilities of the trustees...." *Cassity*, 995 F.2d at 1012. The court further explained:

> [m]ost of the allegations in the complaint make reference to the trust assets or the wrongful acts and representations of Trustees. Thus, to rule on the misfeasance of Trustees would require the court to

> construe Trustees' duties in light of the trust and the Settlement Agreement upheld by the [state probate court]. *Id.*[7]

As in *Cassity*, Petitioners' Florida federal complaint concerns the allegedly improper administration of the trust and breach of trust duties. The allegations in the Florida federal complaint (1) revolve around the trusts and the corporations that are wholly owned by the trusts; (2) arise out of a trust transaction already being litigated in the Michigan Probate Court; and (3) are based on alleged injuries to Petitioners' beneficial interests in the T-1 trust. As the Michigan Probate Court explained, "the Trusts and the Trustee are really inextricably a part of this federal RICO action". (Pet. App. 77a.)[8]

Under *Cassity*, the federal RICO complaint without question concerned the administration of the trust, and the powers, duties,

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[7] *See also Starr v. Rupp*, 421 F.2d 999, 1004 (6th Cir. 1970) ("The fact that plaintiffs pray for damages instead of an accounting and equitable relief on the identical cause of action unsuccessfully asserted in the Probate Court, does not confer jurisdiction on a federal court."); *Igleheart v. Igleheart*, 402 F. Supp. 1, 4 (S.D. Ind., 1975); *Kittredge v. Stevens*, 126 F.2d 263, 267 (1st Cir.), *cert. denied* 317 U.S. 642 (1942); *Moody v. State of Alabama*, 351 So.2d 552 (Ala., 1977), *cert. denied* 435 U.S. 969, and *cert. denied* 439 U.S. 910 (1978) (rejecting argument that proposed action for money damages under federal anti-trust laws was *in personam* in nature, and finding instead that proposed action was merely a ploy to interfere with state *in rem* or *quasi in rem* proceeding).

[8] The crux of Petitioners' Florida federal complaint (Pet. App. 8a-51a) is the claim that the trustee breached his fiduciary duties and made misrepresentations to injure the trust ("T-1"). *See* ¶ 9. ("At all times material hereto, W.A. Dart has acted as the trustee of T-1, T-2 and T-3"); ¶ 118 ("By virtue of their status as fiduciaries of T-1, . . . W.A. Dart and Claire Dart had a duty to provide complete disclosure . . . ."); ¶ 119 ("By so grossly breaching their fiduciary duties to Thomas Dart, Dart Energy, T-1, and the remaining beneficiaries of T-1, W.A. Dart and Claire Dart . . . ."); ¶¶ 124 and 133 (alleged scheme involved "misrepresentation of the value of the assets taken from T-1," in order to cause "injury to T-1, Dart Energy, Thomas Dart, and all other beneficiaries of T-1"); ¶ 137 ("Plaintiffs Thomas Dart and Judith Dart were injured by the association in fact in that the trust of which they are beneficiaries suffered a loss of hundreds of millions of dollars as a result of defendants' successful effectuation of their scheme.").

and liabilities of the trustee. Allowing the Florida federal RICO action to proceed would have interfered with the jurisdiction of the Michigan Probate Court. Therefore, the Michigan Probate Court properly held Petitioners in contempt for violating the injunction which prohibited such duplicative litigation.[9]

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[9] Notably the court in *Cassity* imposed Rule 11 sanctions that were upheld on appeal:

> The courts have a duty to protect the public from frivolous litigation. There was a day when clever counsel were admired by some for inventive methods to resurrect dead litigation. That day has passed. When counsel seek to relitigate that which has previously been litigated, they must be fully prepared to answer for their actions in continuing to instigate litigation.

Stagner v. Pitts, 1993 W.L. 375809; 7 F.3d 1045 (10th Cir. 1993).

IV.

CONCLUSION

For the reasons set forth above, respondents respectfully request that the Petition be denied.

Respectfully submitted,

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Date: April 1, 1996

No. 95-1410

In The Supreme Court of the United States

THOMAS J. DART, et al.,
Petitioners

v.

W. A. DART, et al.,
Respondents

APPENDIX

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APPENDIX A

First Amended Complaint, September 14, 1993, Sarasota County (Florida) Circuit Court Case No. 93 3804 CA-01

THE CIRCUIT COURT FOR
THE TWELFTH JUDICIAL CIRCUIT,
IN AND FOR SARASOTA COUNTY, FLORIDA

GENERAL JURISDICTION

JUDITH L. DART, THOMAS J. DART, (INDIVIDUALLY AND IN BEHALF OF DART ENERGY CORPORATION AND THE THOMAS J. DART RESIDUAL TRUST),

Plaintiffs,

v.

WILLIAM A. DART, CLAIRE T. DART, KENNETH B. DART, ROBERT C. DART, DART CONTAINER CORPORATION, THE KENNETH B. DART RESIDUAL TRUST, THE ROBERT C. DART RESIDUAL TRUST, DART FINANCIAL CORPORATION, BENJAMIN O. SCHWENDENER, WILLIAM L. MYERS, JOANNE WILLIAMS, RICHARD J. RASTALL, ALAN M. VALADE, and AMERICAN APPRAISAL ASSOCIATES, INC. d/b/a STANDARD RESEARCH CONSULTANTS,

Defendants,

and DART ENERGY CORPORATION AND THE THOMAS J. DART RESIDUAL TRUST,

Nominal Defendants.

FIRST AMENDED COMPLAINT

JURY TRIAL DEMANDED

Case No.: 93-3804 CA-01

FLORIDA BAR NO. 145750

Plaintiffs, Judith L. Dart and Thomas J. Dart, individually and in behalf of Dart Energy Corporation and the Thomas J. Dart Residual Trust, by their undersigned counsel, file this First Amended Complaint against the defendants and allege as follows:

SUMMARY OF THE CLAIMS

1. Through this action, plaintiff Thomas Dart seeks to right the wrongs inflicted on himself, his family and his business as the result of the unscrupulous behavior of his father, defendant William A. Dart ("W.A. Dart"), his brothers, defendants Kenneth and Robert Dart, and others who have been drawn into the conspiracy to deprive Thomas Dart of the legacy bestowed upon him by his late grandfather.

2. As hereinafter described, by threat, intimidation, and coercion, and through a series of calculated maneuvers constituting outright fraud, Thomas Dart's father and brothers (with the aid and abetment of the other defendants) have unlawfully manipulated the trusts created, and the multi-million dollar corporations formed and developed by, Thomas Dart's grandfather. Attempting to deprive him of his grandfather's legacy, Thomas Dart's father, in concert with his other sons, his personal legal counsel and the other defendants named in this action, all of whom are under W.A. Dart's complete domination and control, has:

(a) in nearly innumerable ways, breached his fiduciary duties to Thomas Dart and his family and business;

(b) fraudulently induced, intimidated and coerced an incapacitated son to approve a reorganization of the family businesses, despite the devastating financial effect the reorganization had on Thomas Dart, his family and businesses, and the trust established by his grandfather for his and his family's benefit;

(c) breached and tortiously interfered with the terms of the very agreement he had planned to use as the primary vehicle for depriving Thomas Dart of his grandfather's legacy;

(d) unlawfully conspired to and in fact converted property rightfully belonging to his disfavored son and his family and business; and

(e) in the process inflicted severe emotional harm upon this son and daughter-in-law.

For these wrongs and others more fully described below, the plaintiffs seek redress from this Court.

• • •

THIRTEENTH CAUSE OF ACTION

(Florida Statute § 772.103)

• • •

149. Defendants W.A. Dart, Kenneth Dart, Robert Dart, Benjamin 0. Schwendener, Jr., Richard J. Rastall and Alan M. Valade have engaged in a pattern of criminal activity through an enterprise as defined and described in Florida Statute Section 772.102 and have conspired to purposefully defraud the plaintiffs, Dart Energy and T-1 of the amounts due Dart Energy and T-1 under the terms of the Reorganization. By virtue of such conduct, these defendants, through at least two separate instances of conduct that constitutes theft, knowingly obtained and used property rightfully belonging to Dart Energy and T-1 (and beneficially to plaintiffs) with the intent to permanently deprive Dart Energy and T-1 of the right to such property or the benefit therefrom. Further, by virtue of such conduct, these defendants knowingly misappropriated such property for their own use or for the use of persons (including beneficiaries of T-2 and T-3) not entitled thereto.

• • •

APPENDIX B

Petitioners Memorandum in Response to Brief in Support of Motion to Compel Arbitration and Stay Proceedings, May 12, 1992, Ingham County (Michigan) Probate Court File No. G-6372

STATE OF MICHIGAN
PROBATE COURT
COUNTY OF INGHAM

FILE NO.
G-6372

MEMORANDUM OF LAW IN RESPONSE TO BRIEF IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND TO STAY THE PROCEEDINGS

In the matter of William F. Dart Trust

• • •

Statement of the Case

• • •

The Probate Court exists by virtue of constitutional mandate. Its jurisdiction and powers are established by statute. The legislature of the State has seen fit to vest exclusive jurisdiction of "the internal affairs of all trusts" in the Probate Court. **The consequence of the Probate Court's exclusive jurisdiction is that "no other forum has the jurisdiction to hear and determine the action."** (Emphasis added.)

• • •

APPENDIX C

Transcript of hearing on Respondents'
Motion for Injunction, September 29, 1993

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF	FILE NO. G-6372
THE WILLIAM F. DART TRUST	HON. DONALD S. OWENS

GUARDIAN AD LITEM'S MOTION FOR INTERVENTION
RESPONDENTS' MOTION FOR INJUNCTION

BEFORE THE HONORABLE DONALD S. OWENS

Mason, Michigan — Wednesday, September 29, 1993

• • •

[THE COURT:] Mr. Driker says, "Well, they're more form than substance, it's basically the same; it's the same transaction, or occurrence, that these arise out of. You can call these by different names, but, really, they're basically the same, and they ought to be litigated here; and by the way, Judge, the Plaintiffs chose Michigan as the forum for their action regarding this whole issue, the Trusts, Reorganization, the Valuation, and so forth; and, since they chose it they shouldn't be allowed now to go somewhere else just because they have partially not succeeded on an issue."

Now, I realize, for Tom Dart, if my decision that he is barred by the statute of limitations from raising certain issues is upheld, that that does prevent him from quite a bit, I realize that, and I can certainly see why he might want to go someplace else where he could litigate those issues and perhaps succeed. That would be, of course, permitting a person to do an end-run around Michigan law and decisions of this Court.

• • •

And I think the authority of the case law is clear, and given the enormous expense and time commitment and the possible losses in this Court from duplicative legislation [sic, "litigation"], that amounts to oppression, the case cited by Mr. Souris, the Respondents in this case, and cannot be tolerated by our courts.

• • •

APPENDIX D

Order Affirming Injunction, May 17, 1994, Ingham County (Michigan) Circuit Court Case No. 93-75904-AV

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE
WILLIAM F. DART TRUST

Circuit Court
No. 93-75904-AV
(Hon. Lawrence M. Glazer)
Ingham County Probate
Court No. G-6372

ORDER AFFIRMING INJUNCTION

At a session of said Court, held in the Ingham County Courthouse, City of Lansing, County of Ingham, State of Michigan on May 17, 1994

PRESENT: HON. Lawrence M. Glazer
Ingham Circuit Court Judge

Appellants, Thomas J. Dart and Judith L. Dart, appeal to this Court from an Order Enjoining Petitioners Thomas J. Dart and Judith L. Dart from Prosecuting Duplicative Litigation entered on October 15, 1993 by Ingham County Probate Judge Donald S. Owens. The Court has considered the brief and reply brief filed by appellants, the brief filed by appellees, W.A. and Claire Dart and Dart Financial Corporation, the brief filed by appellees, Kenneth B. Dart and members of his family and Robert C. Dart and members of his family, and the Report of the Guardian Ad Litem. The Court has also heard oral argument of counsel for appellants, appellees and the Guardian Ad Litem on April 22, 1994. After considering all of the briefs and arguments submitted,

IT IS HEREBY ORDERED that, for the reasons stated on the record in open court on April 22, 1994, the Order Enjoining Petitioners Thomas J. Dart and Judith L. Dart from Prosecuting Duplicative Litigation entered by the Ingham County Probate Court on October 15, 1993, is hereby affirmed in its entirety.

/ S /

Lawrence M. Glazer
Ingham County Circuit Judge

APPENDIX E

Complaint, July 11, 1994, Ingham County (Michigan) Probate Court Civil Action No. 94-10386-CZ

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE WILLIAM F. DART TRUST

THOMAS J. DART,
JUDITH C. DART,
individually and derivatively
on behalf of DART ENERGY
CORPORATION,

Plaintiffs,

v.

W.A. DART, KENNETH DART,
ROBERT DART, CLAIRE DART,
THE KENNETH B. DART RESIDUAL
TRUST, THE ROBERT C.
DART RESIDUAL TRUST,
BENJAMIN O. SCHWENDENER, JR.,
RICHARD J. RASTALL,
ALAN VALADE,
DART FINANCIAL CORPORATION,
DART CONTAINER CORPORATION,
AMERICAN APPRAISAL
ASSOCIATES d/b/a
STANDARD RESEARCH
CONSULTANTS,

Defendants,

and DART ENERGY CORPORATION
and THE THOMAS J. DART
RESIDUAL TRUST,

Nominal Defendants.

COMPLAINT

CIVIL ACTION
NO. 94-10386-CZ

JURY TRIAL
DEMANDED

Plaintiffs Thomas J. Dart and Judith L. Dart, for their Complaint, represent as follows:

* * *

COUNT I

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT 18 U.S.C. §1962(b)

120. Paragraphs 1 through 119 are incorporated herein by reference.

121. Each of the defendants conspired and agreed with the remaining defendants to effectuate the scheme to defraud outlined above, in violation of 18 U.S.C. § 1962(b).

Mailings

122. Having previously devised the scheme described above to defraud plaintiffs and to obtain money and property from them by means of false and fraudulent pretenses and representations, the following defendants deposited or caused to be deposited the following items in the United States mail on the dates indicated, and addressed as indicated, for the purpose of executing that scheme:

a. DATE: May, 1986

RECIPIENTS:	Morgan Stanley SRC
RESPONSIBLE DEFENDANT:	W.A. DART
SENDER:	Robert Gregory, at W.A. Dart's instruction
CONTENTS:	Dart container financial statements, organizational charts, tax sharing agreement, and business summaries
RELATIONSHIP TO SCHEME:	Defendants intended to, and did in fact, retain an independent entity to perform an appraisal so that the value settled upon would appear objective and fair. But defendants intended to, and did in fact, manipulate the supply of information to the company selected so that the appraisal value in fact would not be fair. The first step in this scheme was, necessarily, to arrange for the appointment of an unrelated entity to perform the appraisal.

b. DATE: October, 1986

RESPONSIBLE DEFENDANT	Benjamin 0. Schwendener, Jr.
SENDER	Benjamin 0. Schwendener, Jr.
RECIPIENTS:	Idelle Hawitt, SRC
CONTENTS:	Letter outlining general premises of the proposed reorganization
RELATIONSHIP TO SCHEME:	To facilitate SRC's appraisal

c. DATE: July, 1988

RESPONSIBLE DEFENDANT:	W.A. Dart, Kenneth Dart, Robert Dart, Benjamin 0. Schwendener, Jr., Richard J. Rastall, Alan Valade
SENDER SRC	
RECIPIENTS:	W.A. Dart, Robert Gregory
CONTENTS:	Draft SRC appraisal
RELATIONSHIP TO SCHEME:	An essential part of the scheme was that SRC produce an appraisal that appeared to be based on input from all affected parties and on consideration of all information supplied. To effectuate this goal it was necessary for SRC to allow Gregory as well as W.A. Dart to see a draft of SRC's work product and to comment thereupon.

d. DATE: January, 1993

RECIPIENT:	Thomas Dart
RESPONSIBLE DEFENDANT:	W.A. Dart
SENDER:	W.A. Dart
CONTENTS:	Fraudulent "promissory note" dated 1978
RELATIONSHIP TO SCHEME:	W.A. Dart refused to cause T-1 to pay back funds it had borrowed from Thomas Dart in order to prevent Thomas Dart from being able to pay attorneys to investigate and prosecute the claims at issue in this Complaint

and other claims. The fraudulent promissory note was an effort to substantiate W.A. Dart's fraudulent claim that the loan had never been made on its true terms.

Each such mailing was a separate act of mail fraud in violation of 18 U.S.C. § 1341. Each was also a separate act of racketeering activity within the meaning of 18 U.S.C. § 1961.

Wire Communications

123. Having previously devised the scheme described above to defraud plaintiffs and to obtain money and property from them by means of false and fraudulent pretenses and representations, the following defendant transmitted or caused to be transmitted information by wire in interstate commerce on the dates indicated, and to the persons indicated, for the purpose of executing that scheme:

a. DATE: August and September, 1986

RESPONSIBLE DEFENDANT:	W.A. Dart
PARTICIPANTS IN CALL:	W.A. Dart, Robert Gregory
SUBSTANCE OF COMMUNICATION:	W.A. Dart directed Gregory that all information and contact with SRC during the appraisal should be exclusively through W.A. Dart.
RELATIONSHIP TO SCHEME:	This directive enabled W.A. Dart to control the flow of information to SRC, and also enabled him to speak in confidence to SRC when he ordered SRC to produce an inaccurately low appraisal of Dart Container.

b. DATE: February, 1987

RESPONSIBLE DEFENDANT:	W.A. Dart
PARTICIPANTS IN CALL:	W.A. Dart, Robert Gregory
SUBSTANCE OF COMMUNICATION:	This telephone conversation concerned appraisal methods to be used by SRC.
RELATIONSHIP TO SCHEME:	W.A. Dart spoke by telephone with Robert Gregory regarding the SRC valuation in order to advance his and the remaining defendants' goal of ensuring that SRC issued an appraisal that appeared to be objective and exhaustive but that in fact set a fraudulently low value on Dart Container.

c. DATE: March, 1987

RESPONSIBLE DEFENDANT:	W.A. Dart
PARTICIPANTS IN CALL:	W.A. Dart, Robert Gregory
SUBSTANCE OF COMMUNICATION:	W.A. Dart instructed Gregory that all data to be supplied to SRC should be sent by Gregory to W.A. Dart, who would then forward it to SRC.
RELATIONSHIP TO SCHEME:	This directive enabled W.A. Dart to control the flow of information to SRC, and also enabled him to speak in confidence to SRC when he ordered SRC to produce an inaccurately low appraisal of Dart Container.

d. DATE: June 3, 1991

RESPONSIBLE DEFENDANT:	W.A. Dart
PARTICIPANTS IN CALL:	W.A. Dart, Robert Gregory
SUBSTANCE OF COMMUNICATION:	This telephone conversation, which was initiated by W.A. Dart, concerned valuation methods and the SRC report. Gregory stated his belief that SRC had been ordered to produce an inaccurately low valuation of Dart Container. W.A. Dart falsely stated that neither he nor any other person had influenced SRC in its valuation.
RELATIONSHIP TO SCHEME:	W.A. Dart made this statement to conceal and advance his and the remaining defendants' scheme to obtain control over Dart Container at a price less than the fair value of these assets.

Each such communication was a separate act of wire fraud in violation of 18 U.S.C. § 1343. Each was also a separate act of racketeering activity within the meaning of 18 U.S.C. § 1961.

124. The acts by each of these defendants were all related to one another in that they shared a common goal, a common method, and a common set of victims, all of which had been jointly agreed upon by the defendants: the removal of Thomas Dart from participation in Dart Container at the lowest possible cost to T-2, T-3, Kenneth Dart, Robert Dart, Claire Dart, and W.A. Dart, through misrepresentation of the value of the assets taken from T-1. The lower the cost to these persons and entities, the greater the injury to T-1, Dart Energy, Thomas Dart, and all other beneficiaries of T-1. Each of the communications identified in paragraphs 122 and 123 advanced this goal in the method indicated.

125. These acts satisfy the continuity requirement imposed by the Racketeer Influenced and Corrupt Organizations Act in that they each shared and together advanced a common goal, a common method, a common set of victims, and in that they continued over a period of at least eight years, from 1986 through the present.

126. The mailings and wire communications were in furtherance of the scheme in that each either facilitated defendants' goal of causing SRC to produce an inaccurately low appraisal of SRC, concealed the defendants' awareness of the inaccuracy of the valuation thus produced, or both.

The Enterprise

127. Dart Container Corporation is an enterprise engaged in interstate and foreign commerce.

128. The purpose and effect of defendants' scheme was to obtain and maintain control over Dart Container Corporation. Defendants achieved this goal through the pattern of racketeering activity alleged in paragraphs 120 through 126 above, in violation of 18 U.S.C. § 1962(b).

129. Defendants bear the following relationship to the enterprise:

NAME	RELATIONSHIP
W.A. Dart	Chairman of the Board
Kenneth Dart	Officer and director
Robert Dart	Officer and director
Claire Dart	50% shareholder
Benjamin 0. Schwendener, Jr.	Director, Vice President and Counsel
Richard J. Rastall	Counsel
Alan Valade	Counsel

130. The affairs of the enterprise affect interstate and foreign commerce in that Dart Container maintains operations in at least twelve states, and around the world, and has annual revenues in excess of $900 million.

COUNT II
Racketeer Influenced and Corrupt Organizations Act
18 U.S.C. §1962(c)

131. Paragraphs 1 through 130 are incorporated herein by reference.

132. An association in fact existed among defendants W.A. Dart, Kenneth Dart, Robert Dart, Claire Dart, Benjamin 0. Schwendener, Jr., Richard J. Rastall, and Alan Valade, which constitutes an enterprise for purposes of 18 U.S.C. § 1962(c).

133. The shared purpose of this association in fact was the removal of Thomas Dart from participation in Dart Container at the lowest possible cost to T-2, T-3, Kenneth Dart, Robert Dart, Claire Dart and W.A. Dart, through misrepresentation of the value of the assets taken from T-1. The lower the cost to these persons and entities, the greater the injury to T-1, Dart Energy, Thomas Dart, and all other beneficiaries of T-1. Each of the communications identified in paragraphs 122 and 123 advanced this goal in the method there indicated and as more fully alleged in paragraph 124 above.

134. The structure of this association in fact remained the same from the time of its creation — when the goals identified in paragraph 124 were agreed upon — through to the present. The most active participants in the association in fact, and those principally responsible for carrying out its goals, were and are W.A. Dart and Kenneth Dart.

135. Each of the defendants identified in paragraph 132 participated in the conduct of this association in fact through a pattern of racketeering activity, as set forth in paragraphs 122 and 123 above.

136. The association in fact affected interstate commerce in that its purpose and effect was to obtain control over Dart Container Corporation, which is an entity engaged in interstate commerce. The association in fact also affected interstate commerce by using the mails and interstate wire communications to effectuate its goal.

137. Plaintiffs Thomas Dart and Judith Dart were injured by the association in fact in that the trust of which they are beneficiaries suffered a loss of hundreds of millions of dollars as a result of defendants' successful effectuation of their scheme.

138. Plaintiff Dart Energy was injured by the association in fact in that, under the 1986 Reorganization Agreement, payments were supposed to be made to Dart Energy sufficient to equalize the value of that company and the value of one-third of Dart Container. As a result of defendants' scheme, effectuated through the association in fact alleged herein, these payments were hundreds of millions of dollars less than they should have been.

* * *

APPENDIX F

Thomas J. Dart's First Amended Petition, October 2, 1992, Ingham County (Michigan) Probate Court File No. G-6372

STATE OF MICHIGAN
PROBATE COURT
COUNTY OF INGHAM

FIRST AMENDED
PETITION

FILE NO. G-6372

In the matter of William F. Dart Trust

* * *

77. In July 1990, when Petitioner was in W.A. Dart's office, W.A. Dart gave Petitioner a document which has subsequently been marked as Petitioner's Deposition Exhibit P-15. Petitioner was asked to sign this document in order to guarantee Dart container of California a "most favored customer" status as a Dart Energy customer, and hence advance certain tax arguments being made to the California taxing authorities. In reviewing this document, Petitioner noted that buried within it were waivers of objections to the 1986 Reorganization and its valuations. Petitioner refused to sign the document.

* * *

APPENDIX G

W.A. Dart's Deposition Transcript, August 26, 1992, Ingham County (Michigan) Probate Court File No. G-6372

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN RE: WILLIAM F. DART TRUST — VOLUME II

VIDEO DEPOSITION

of WILLIAM A. DART, a witness called by Petitioner, taken before Diane M. Spaniolo, Certified Shorthand Reporter and Notary Public, on Wednesday, August 26, 1992, at 313 South Washington Square, Lansing, Michigan, noticed for the hour of 9:00 a.m.

• • •

Q [BY MR. BOIES:] Let me turn to Exhibit P-15. You indicated that you had told Mr. Schwendener to take out certain language related to valuation. That language relating to valuation that you instructed Mr. Schwendener to take out was language contained in Exhibit P-15 is that correct?

A. Yes.

Q. How did you happen to tell Mr. Schwendener to take this language out?

A. I believe Tom contacted me and told me that he wouldn't sign it with that in there.

Q. Do you recall meeting with your son Tom on or shortly before July 11, 1990 in your office?

A. I don't remember that specific date, but perhaps you can refresh my memory with what may have occurred.

Q. Do you recall a time in or about the summer of 1990, which I believe was in July, when your son Tom visited you in your office and had with him one of his sons, one of your grandchildren, and you gave him a copy of Exhibit P-15?

A. I don't recall that specifically.

Q. Do you recall that generally?

A. I didn't recall handing this to Tom directly.

• • •

APPENDIX H

Notice of Voluntary Dismissal, September 2, 1994,
Ingham County Probate (Michigan) Court
Civil Action No. 94-10386-CZ

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF THE WILLIAM F. DART TRUST

THOMAS J. DART,
JUDITH C. DART,
individually and derivatively
on behalf of DART ENERGY
CORPORATION,

Plaintiffs,

v.

W.A. DART, KENNETH DART,
ROBERT DART, CLAIRE DART,
THE KENNETH B. DART RESIDUAL
TRUST, THE ROBERT C.
DART RESIDUAL TRUST,
BENJAMIN O. SCHWENDENER, JR.,
RICHARD J. RASTALL,
ALAN VALADE,
DART FINANCIAL CORPORATION,
DART CONTAINER CORPORATION,
AMERICAN APPRAISAL
ASSOCIATES d/b/a
STANDARD RESEARCH
CONSULTANTS,

Defendants,

and DART ENERGY CORPORATION
and THE THOMAS J. DART
RESIDUAL TRUST,

Nominal Defendants.

NOTICE OF
VOLUNTARY
DISMISSAL

CIVIL ACTION
NO. 94-10386-CZ

The Plaintiffs, Thomas J. Dart and Judith L. Dart, by their attorneys, voluntarily dismiss this civil action, without prejudice,

pursuant to MCR 2.504(A)(1)(a). To the best of our knowledge, no adverse party has served an answer or a motion under MCR. 2.116.

FRASER, TREBILCOCK, DAVIS & FOSTER, P.C.

September 2, 1994

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No. 95-1410

Supreme Court, U.S.
FILED
APR 25 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS J. DART, et al.,

Petitioners

v.

W.A. DART, et al.

Respondents

On Petition For A Writ of Certiorari
To The Supreme Court Of
The State Of Michigan

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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I. INTRODUCTION.

Except to the extent that it conveys a sense of the rancor which has afflicted the underlying litigation in the Michigan probate court, Respondents' statement of the case obscures more than it reveals. For example, by attempting to challenge Petitioners' motives in bringing the Federal RICO Action (Opp. at 1-2), Respondents ignore the fact that the Constitution places no burden of justification on those who wish to exercise their Constitutional rights. Here, Petitioners elected to litigate their federal RICO claims in a federal district court.[1] Their right to do so is explicitly conferred by Congress[2], and is protected against state court attacks by the Supremacy Clause of the United States Constitution. *Donovan v. Dallas,* 377 U.S. 408 (1964). Petitioners' motives in wishing to litigate in a federal forum are no more subject to question than are the motives of any citizen in exercising any constitutionally protected right.[3]

Nor is there any basis for Respondents' implication that there is something impermissible about simultaneously pursuing multiple lawsuits in different forums, even where the factual and legal issues substantially overlap. As this Court held in *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456 (1939):

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1. Contrary to Respondents' accusation, Petitioners' did ***not*** attempt to "conceal" the fact that, coincident with the filing of the Federal Action, Petitioners also asserted a RICO claim in the Michigan Action. *See* Pet. App. at 4a (letter dated July 14, 1994 from Petitioners' counsel to Judge Donald Owens of the Michigan probate court).

2. *See* 18 U.S.C. §1964(c) and 28 U.S.C. §1331.

3. As this Court noted in *General Atomic Co. v. Felter,* 434 U.S. 12, 17 (1977):

"... *Donovan* presented as compelling a case as there could be for permitting a state court to enjoin the further prosection of vexatious federal proceedings. It involved a suit filed in federal court after the issuance of a final state-court judgment deciding the principal claims pressed in the federal action adversely to the federal plaintiffs. Moreover, as the *Donovan* opinion pointed out, the pendency of the federal action had the effect of rendering the state-court judgment ineffective ... We nevertheless overturned the state-court injunction."

> Certain it is, therefore, that if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other.

305 U.S. at 465-466 (citations omitted).

Throughout their Opposition, Respondents also attempt to obscure the critical fact that the September 16, 1994 Contempt Order was the first adjudication by the probate court that Petitioners were enjoined from litigating a federal claim in federal court. As previously explained (Pet. at 3-4, 6; Pet. App. at 1a), the October 15, 1994 Anti-Suit Injunction only purported to enjoin new actions which asserted certain enumerated claims which had previously been asserted in the Michigan Action and the Florida State Court Suit.[4] At the time the Injunction was entered, no federal RICO claim had been asserted in either action. Thus, when it subsequently acted (by means of the September 16, 1994 Contempt Order) to prevent Petitioners from litigating their federal RICO claims in the subsequently-filed Federal Action, the probate court necessarily expanded the scope of its injunction. Perhaps the probate court implicitly recognized this fact when it deferred sentencing until October 14, 1994, in order to give Petitioners an opportunity to "purge" themselves of the asserted "contempt."

In light of this fact, it is inaccurate for Respondents to characterize the present appeal as a "collateral attack" on the

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4. The Anti-Suit Injunction did ***not*** on its face bar all claims arising from the same nucleus of fact as the claims asserted in the Michigan Action and the Florida State Court Suit. Pet. App. at 1. In fact, the Injunction expressly allowed Petitioners to proceed in the Florida State Court Suit on their claim for damages for emotional distress, even thought the acts giving rise to that claim were exactly the same as the facts and deeds at issue in the rest of the complaint in the Florida State Court Suit and in the petitions in the Michigan Action.

Anti-Suit Injunction, because the order entering the Injunction did not adjudicate Petitioners' right to litigate federal RICO claims in federal court. That question was not presented until Petitioners later filed their Federal Action. See Section II.C., *infra.*

The Court should grant review of the Contempt Order, because Respondents have failed to identify any procedural barrier to review, and because the case raises important legal issues regarding the respective powers of the state and federal courts.

II. RESPONDENTS HAVE IDENTIFIED NO PROCEDURAL BARRIERS TO REVIEW.

A. The Present Appeal Is Not Moot, Because The Issues Presented Are Live, And Petitioners Have A Legally Cognizable Interest In The Outcome.

In general, a case becomes moot only "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982), *citing United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 386 (1980), and *Powell v. McCormack*, 395 U.S. 486, 496 (1969). The present appeal is not moot, because its outcome will effectively determine whether Petitioners can litigate their federal claims in a federal forum.

As previously explained (Pet. at 7-8), Petitioners avoided imprisonment in this case only by dismissing without prejudice the Federal Action by means of a Notice of Stipulated Dismissal filed with the United States District Court for the Middle District of Florida on October 18, 1994. Pet. App. at 59a. The Notice of Dismissal was subject to and incorporated by reference the terms of a Stipulated Order entered by the Michigan probate court on October 17, 1994. Pet App. at 56a.

The Stipulated Order explicitly preserves Petitioners' rights to resume prosecution of their federal RICO claims in

federal court if the Contempt Order is reversed on appeal.[5] If this Court grants certiorari and reverses the contempt ruling, Petitioners will exercise their rights by promptly refiling the Federal Action. If this Court denies review or sustains the Contempt Order, Petitioners will be effectively foreclosed from litigating their federal claims in a federal forum. Under these circumstances, it makes no sense for Respondents to argue that nothing turns on the outcome of this Petition.

In the cases cited by Respondents — *In re Grand Jury Subpoena,* 955 F.2d 670 (11th Cir. 1992) and *In re Hunt,* 754 F.2d 1290 (5th Cir. 1985) — mootness was found because the contempt apparently was purged in a manner that left no live case or controversy for adjudication.[6] By contrast, courts have refused to find mootness, and have exercised their appellate

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5. The Stipulated Order provides in relevant part as follows:

> 2. [Petitioners'] dismissal [of the Federal Action] shall be without prejudice as to all defendants in the Federal Action and the statute of limitations shall be tolled as to the claims in the complaint filed in the [Federal Action] on or about July 8, 1994 from the date of such dismissal until 15 days after all appellate review in the courts of Michigan of the Injunction and the Contempt Order shall have been completed, including the decision on any application for appellate review (by appeal, certiorari, or otherwise) to the United States Supreme Court.
>
> 3. Neither the consent of the parties to entry of this Order nor entry of this order shall be deemed to waive any claim or defense, procedural or substantive, legal or equitable to the claims in the [Federal Action] (including the defense that such claims are subject to arbitration).

Pet. App. at 57a.

6. In *In re Grand Jury Subpoena,* the contemnor had purged by producing certain documents pursuant to a subpoena. Any prejudice arising from the disclosure of the documents in question could not be undone by reversal of the contempt order on appeal. Similarly, in *In re Hunt,* the contemnor purged his contempt by dismissing certain specified legal actions. There is no indication that the dismissals were without prejudice, or that any court order preserved the contemnor's ability to re-file the dismissed actions depending on the outcome of any appeal. Indeed, respondents characterize the contemnor in *In re Hunt* as having "abandoned the litigation." Opp. at 6. Under the circumstances presented in that case, the outcome of any appeal would have been without any practical effect for the appellant.

jurisdiction, where a live case or controversy survives purgation of the contempt. For example, in *Thomassen v. United States,* 835 F.2d 727 (9th Cir. 1987), one Thomassen purged his contempt by complying with an order to pay an award of attorneys' fees to the government. Because Thomassen sought a return of the fees in question, the appellate court rejected the government's contention that the appeal was moot:

> We recognize also that the purging of the contempt ordinarily renders the controversy moot. . . . This doctrine stems from the fact that in most instances the court has no remedy to afford the party contesting the now purged contempt. Thomassen, however, seeks the return of the attorney fee award he was forced to pay to secure his release from prison. Hence, we are presented with a live controversy which is inextricably intertwined with the contempt issue and we are capable of providing relief.

Id., 835 F.2d at 731-32.[7]

Similarly, in *Rhode Island Hosp. Trust Nat'l Bank v. Howard Communications Corp.,* 980 F.2d 823 (1st Cir. 1992), the district court made a finding of contempt and directed the contemnors to reimburse their adversaries for certain legal expenses. *Id.,* 980 F.2d at 827. The contemnors purged the contempt "conditionally" by paying the fees in question, subject to a request that the funds be placed in escrow pending the outcome of an appeal. *Id.,* 980 F.2d at 829, n.9. Since the resolution of the appeal would effectively determine whether the appellant was entitled to a return of the funds from escrow, there was a live case or controversy, and the appeal was not moot. *Id.*

Like the appellants in *Rhode Island Hosp. Trust Nat'l Bank,* Petitioners' satisfaction of the contempt sanction was conditional, and Petitioners have effectively preserved their

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7. *See also Davies v. Grossmont Union High School District,* 930 F.2d 1390, 1394 (9th Cir.), *cert. denied,* 501 U.S. 1252 (1991) (court not deprived of appellate jurisdiction notwithstanding fact that appellant purged contempt by complying with order to resign from office; a live controversy was presented by the fact that appellant sought reinstatement on appeal, and by the fact that the contempt order would effectively foreclose appellant from specified employment in the future).

rights in the event that the Contempt Order is reversed on appeal. Because Petitioners have a very real stake in the outcome of the present appeal, the appeal cannot properly be characterized as moot.

B. The Contempt Ruling Is Ripe For Review.

Respondents' contention that the Contempt Order does not constitute a final appealable order is belied by the fact that both the Ingham County Circuit Court and the Michigan Court of Appeals denied Petitioners' appeals on the merits, and not based on the asserted absence of any final appealable order. Pet. at 8; Pet. App. at 63a, 82a. Neither court would have reached the merits if it believed that jurisdiction was foreclosed by the absence of a final appealable order.[8]

As previously explained (Pet. at 8-9, n.4) Petitioners will have no meaningful opportunity for further review of the Contempt Order in the Michigan courts. Even assuming that the Michigan Supreme Court would be inclined to review the Contempt Order following the entry of a final judgment in the underlying Michigan Action, and even assuming the Michigan Supreme Court were to reverse the Contempt Order at that time, Petitioners would still be irreparably deprived of their right to litigate their federal claims in federal court. The entry of an adverse final judgment in the Michigan Action would collaterally estop Petitioners from relitigating any common factual issues in a re-filed Federal Action.

Moreover, pursuant to the terms of the October 17, 1994 Stipulated Order, the limitations period on Petitioners' federal RICO claim is tolled only until 15 days after Petitioners have exhausted all appeals of the Contempt Order. When Petitioners filed the Federal RICO Action, there were arguably only

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8. There is no merit to Respondents' argument (Opp. at 7) that the Contempt Order is not appealable due to an alleged absence of sanctions. "[T]he general rule is that only a citation for contempt, not the imposition of sanctions, is necessary for appellate review." *In re Three Grand Jury Subpoenas* 847 F.2d 1024, 1028-28 (2nd Cir. 1988) (analyzing cases). *See also, In re Grand Jury Subpoena, etc.*, 784 F.2d 116, 118 (2nd Cir. 1986); *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 180 (2nd Cir. 1979).

three days remaining before the applicable limitations period would run. See Pet. at 4. Accordingly, Respondents could be expected to argue that the limitations period on Petitioners' federal RICO claims would expire 18 days after any denial of the present Petition, and Petitioners could be forever foreclosed from litigating these claims in a federal forum.[9]

C. The Present Appeal Does Not Involve A Collateral Attack On The October 15, 1993 Anti-Suit Injunction.

The Anti-Suit Injunction only purported to enjoin the prosecution of actions asserting certain enumerated claims which had been previously asserted in the Michigan Action and in the Florida State Court Suit. The enumerated claims did ***not*** include a federal RICO claim. The Probate Court had no occasion to consider whether Petitioners could prosecute other actions asserting federal RICO claims until Petitioners

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9. As noted (Pet. at 8-9, n.4), review in this case is supported by this Court's decision in *General Atomic Co. v. Felter,* 434 U.S. 12 (1977), where this Court, ruling on a petition for review of a state-court anti-suit injunction, specifically noted that "there is no final state court judgment, since [the underlying state court action] has not yet been tried," but nevertheless granted certiorari because the petitioner's "opportunity to fairly litigate the various claims arising from this complex action would be substantially prejudiced if the injunction were allowed to stand." *Id.,* 434 U.S. at 17-18. Respondents try to distinguish *General Atomic* on the ground that the focus of review in that case was the underlying injunction, rather than the contempt order. Citing to 28 U.S.C. §1292(a)(1), Respondents assert that injunctions and writs of prohibition "are reviewable on wholly independent statutory grounds not applicable here." Opp. at 7.

Respondents' effort to differentiate between the Injunction and the Contempt Order for purposes of the *General Atomic* analysis is not persuasive. Petitioners note that this Court's review of state court judgments is governed by 28 U.S.C. §1257, and not §1292(a)(1), and §1257 does not differentiate between injunctions and contempt orders. To the extent that §1292(a)(1) has any bearing on this Court's jurisdiction (as Respondents suggest), the Contempt Order would be independently appealable as an order modifying an injunction, because, as discussed, the Contempt Order represented the Probate Court's first pronouncement on the permissibility of bringing a federal RICO action, and substantively expanded the scope of the Anti-Suit Injunction. *See, United States v. O'Rourke,* 943 F.2d 180, 186 (2d. Cir. 1991); *Gregory v. Depte,* 896 F.2d 31, 34 (3d Cir. 1990); *Western Water Management, Inc. v. Brown,* 40 F.3d 105, 108 n.1 (5th Cir. 1994).

later asserted such a claim in the Federal Action. The Contempt Order was the Probate Court's ***first*** ruling concerning Petitioners' freedom to file other actions asserting federal RICO claims, and it is wholly appropriate for Petitioners to seek review of that ruling herein.

Moreover, it is impossible to imagine how Petitioners could have sought appellate review of the Anti-Suit Injunction as it bears on a federal RICO claim, since no such claim was pending at the time the Injunction was entered, and since the Injunction does not on its face extend to such claims. Had Petitioners attempted to attack the Injunction upon its issuance for denying them the right to prosecute an entirely hypothetical federal claim, the appellate courts properly would have refused to consider such a question. The collateral bar rule has no application here, where no adequate or effective remedies existed for the orderly review of the challenged ruling. *In re Novak*, 932 F.2d 1397, 1401 (11th Cir. 1991), *citing United States v. Dickinson*, 465 F.2d 496, 511 (5th Cir. 1972).

III. THE PETITION PRESENTS ISSUES WORTHY OF THIS COURT'S REVIEW, BECAUSE THERE ARE GENUINE CONFLICTS REGARDING THE APPLICABLE LEGAL PRINCIPLES.

Contrary to Respondents' argument, the instant appeal involves genuine conflicts regarding important legal principles affecting the respective powers of the federal and state courts. The parties agree that Petitioners' ability to proceed with the Federal Action turns on whether jurisdiction in that Action is *in personam* (in which case Petitioners could proceed consistent with *Donovan* and *General Atomic*) or *in rem* or *quasi in rem* (in which case Petitioners might be barred from proceeding under *Princess Lida*). Beyond this point in the analysis, the parties diverge.

Petitioners submit that it was improper for the Michigan courts to attempt to characterize the jurisdictional basis for the Federal RICO Action. Pet. at 15-16. For state courts to attempt this kind of determination is to undermine the supremacy of federal power. Rather, it should fall to the fed-

eral courts to determine the character of the actions brought before them, and to decide whether they should proceed under the abstention principles articulated in *Colorado River Conservation Dist. v. United States,* 424 U.S. 800 (1976).

Princess Lida did uphold a state-court injunction against *in rem* proceedings in the federal court (See Pet. at 15), but that case was decided 57 years ago, before the federal courts had developed doctrines of abstention, and before *Donovan* and *General Atomic* announced a clear rule barring state courts from enjoining federal proceedings. Neither Petitioners nor Respondents have been able to identify any case in the intervening 57 years (other than the present case) in which *Princess Lida* has been construed to allow a state court to use its injunctive and contempt power to compel dismissal of a federal claim in federal court.[10]

Moreover, the Michigan courts substantively erred in concluding that the Federal Action was *in rem* or *quasi in rem.* While the Michigan courts may have claimed that they were basing their analysis on federal law, their conclusions simply cannot be squared with the numerous federal cases holding that federal actions for money damages against trustees for mismanagement and breaches of trust may proceed without affecting a state court's control or supervision of the trust. *See, e.g., Southwestern Bank & Trust Co. v. Metcalf State Bank,* 525 F.2d 140 (10th Cir. 1975); *Rogers v. Girard Trust Co.,* 159 F.2d 239 (6th Cir. 1947); *Powell v. American Bank & Trust Co.,* 640 F. Supp. 1568 (N.D. Ind. 1986); *Mooney v. Fidelity Union Bank,* No. 82-3192, 82-3193 (D.N.J. March 10, 1983); *Beach v. Rome Trust Co.,* 269 F.2d 367, 372 (2d Cir. 1959); *Martz v. Braun,* 266 F. Supp. 134 (E.D. Pa. 1967); *Silberman v. Worden,* No. 87 C 8368, 1988 U.S. Dist. LEXIS 10455 (N.D. Ill. Sept. 15, 1988); *Stewart Sec. Corp. v. Guaranty Trust Co.,* 71 F.R.D.

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10. Neither *Donovan* nor *General Atomic* involved any dispute as to the jurisdictional character of the federal action: the federal action in each case was clearly *in personam.* The issue in each case was ***not*** whether the characterization of the federal action was correct (or which court should characterize the action), but whether the state court could enjoin prosecution of a federal action that was clearly *in personam.* Respondents' reliance on these cases (Opp. at 10) is therefore misplaced.

32, 33 (W.D. Okla. 1976). Even though these cases were discussed at length in the Petition, Respondents have utterly failed to address them.[11]

IV. CONCLUSION.

For the foregoing reasons, and for the reasons set forth in the Petition, the Court should issue a writ of certiorari to review the decision of the Michigan court.

Dated: April 25, 1996

Respectfully submitted,

/s/

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11. The principal case relied on by Respondents — *Cassity v. Pitts*, 995 F.2d 1009 (10th Cir. 1993) — simply does not support the Michigan courts' conclusion that the Federal Action was in the nature of an *in rem* or *quasi in rem* proceeding. Clearly, the outright voiding of a trust (which was part of the requested relief in *Cassity*) could not be accomplished without an exercise of jurisdiction over the trust. By contrast, Petitioners, as plaintiffs in the Federal Action, sought only money damages which were not specifically identified to any trust or trust assets. Petitioners' Federal Action was clearly *in personam*, and could be fully adjudicated without interfering with the Michigan courts' jurisdiction over the Dart trusts.

Assuming, *arguendo*, that the Michigan courts' interpretation of *Cassity* is correct, then *Cassity* must be seen to conflict with the above-cited cases in the main text. The existence of such an inter-circuit conflict would militate in favor of issuing a writ of certiorari.